INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(QATAR *v.* UNITED ARAB EMIRATES)

PRELIMINARY OBJECTIONS OF THE UNITED ARAB EMIRATES

Volume I of IV

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I. INTRODUCTION

1. On 11 June 2018, Qatar filed with the Court an Application instituting proceedings (the "**Application**") against the United Arab Emirates (the "**UAE**") alleging that acts taken against Qatar and its citizens by the UAE in response to Qatar's repeated violations of its obligations under international law constituted breaches of the Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**" or the "**Convention**"). On the same day, Qatar filed a request for the indication of provisional measures (the "**Request for Provisional Measures**") in which it asked the Court to indicate a series of provisional measures it asserted were necessary to protect individual citizens of Qatar from violations of their rights under the CERD.

2. Prior to filing the Application and the Request for Provisional Measures, however, Qatar had, on 8 March 2018, also filed a Communication (the "**CERD Communication**") with the Committee on the Elimination of All Forms of Racial Discrimination (the "**CERD Committee**") under Article 11 of the Convention alleging that, on the basis of the same factual and legal allegations raised in Qatar's submissions to the Court, the UAE had violated the CERD. The CERD Communication was transmitted to the UAE on 7 May 2018, or approximately one month before the Application and the Request for Provisional Measures were filed with the Court.

3. The Court held hearings on the Request for Provisional Measures from 27 June 2018 to 29 June 2018. On 23 July 2018, the Court rendered an Order (the "**Order on Provisional Measures**"), by eight votes to seven, indicating certain provisional measures directed to the UAE, but declining to grant any of the nine specific provisional measures requested by Qatar, and by eleven votes to four, indicating a provisional measure directed to both the UAE and Qatar: that the parties "refrain from any action which might aggravate or extend

the dispute before the Court or make it more difficult to resolve." Six separate and dissenting opinions were appended to the Order.

4. By an Order of 25 July 2018, the Court fixed the time-limits for the parties' respective pleadings as 25 April 2019 for Qatar's Memorial and 27 January 2020 for the UAE's Counter-Memorial.

5. After seeming to have abandoned the CERD Communication by filing the Application, Qatar renewed its request to the CERD Committee on 29 October 2018, asking it to take up the dispute "again" pursuant to the procedures under Article 11 of the Convention.[1] Qatar thus put before the CERD Committee for consideration the same factual and legal issues it had also submitted to the Court.

6. Following its initial CERD Communication and the UAE's replies thereto, which were dated 7 August 2018[2] and 29 November 2018,[3] further submissions were made to the CERD Committee by the parties on the issues of jurisdiction and admissibility on, respectively, 14 January 2019 (by the UAE),[4] 14 February 2019 (by Qatar),[5] and 19 March 2019 (by the UAE).[6] In its submissions before the CERD Committee, the UAE argued, *inter alia*, that as the

[1] *Note Verbale* from Qatar to the CERD Committee, 29 October 2018, p. 3 (**Annex 14)**.

[2] *The State of Qatar v. United Arab Emirates*, 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, 7 August 2018 (**Annex 13**).

[3] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Supplemental Response of the UAE, 29 November 2018, paras. 72-79 (**Annex 16**).

[4] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Supplemental Response of the UAE on the Issues of Jurisdiction and Admissibility, 14 January 2019 (**Annex 17**).

[5] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Response of the State of Qatar, 14 February 2019 (**Annex 18**).

[6] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, UAE's Comments on Qatar's Response on Issues of Jurisdiction and Admissibility, 19 March 2019 (**Annex 19**).

Court (the recourse of "last resort" in the dispute resolution provisions of the Convention) was already seized of the dispute (albeit prematurely[7]) through Qatar's Application and Request for Provisional Measures, the existence of concurrent proceedings before the CERD Committee and the Court rendered the CERD Communication inadmissible.[8]

7. On 22 March 2019, in light of the continuation of the procedures before the CERD Committee, the UAE submitted to this Court a request for the indication of provisional measures which includes the request to "order that Qatar immediately withdraw" the CERD Communication submitted to the CERD Committee on 8 March 2018.[9]

8. It is evident from Qatar's Application, from both parties' pleadings during the provisional measures phase, from the Court's Order on Provisional Measures and the separate and dissenting opinions accompanying it, and from the arguments made by the parties in their submissions to the CERD Committee, that serious questions remain to be answered in relation to the jurisdiction of the Court to determine the merits of Qatar's claims before it.

9. Accordingly, the UAE submits these preliminary objections so that the Court can efficiently and expeditiously determine at this preliminary stage whether or not it has jurisdiction over the Application filed by Qatar. The UAE does so pursuant to Article 79(1) of the Rules of Court, which provides that:

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[7] *See* paras. 212-213, *infra*.

[8] *See, e.g., The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, UAE's Comments on Qatar's Response on Issues of Jurisdiction and Admissibility, 19 March 2019, 158-203 (**Annex 19**).

[9] *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 to Preserve the United Arab Emirates' Procedural Rights and to Prevent Qatar from Aggravating or Extending the Dispute, Submitted by the United Arab Emirates, 22 March 2019, para. 74(i).

> Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial.

10. While the outer limit for bringing objections to jurisdiction and admissibility, on which a decision is requested prior to any further proceedings on the merits, is three months after the filing of the claimant's Memorial, the principal part of the rule set out in Article 79(1) is that such objections shall be made "as soon as possible". That, of course, encompasses the period prior to the filing of the claimant's Memorial. This was specifically acknowledged by the Court, for example, in *Aerial Incident (Iran v. United States)*[10] and in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia).*[11]

11. The procedural consequence of such preliminary objections is to suspend immediately the proceedings on the merits until the Court has ruled on the objections. Article 79(5) of the Rules of Court is "categorical" in this regard:

> Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended . . .[12]

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[10] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Order of 13 December 1989, I.C.J. Reports 1989*, p. 132, p. 134 ("Whereas, in accordance with Article 79, paragraph 1, of the Rules of Court, while a respondent which wishes to submit a preliminary objection is entitled before doing so to be informed as to the nature of the claim by the submission of a Memorial by the Applicant, *it may nevertheless file its objection earlier*.") (emphasis added).

[11] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, p. 107, para. 5.

[12] *See, e.g.*, *Interhandel Case (Switzerland v. United States of America), Judgment, I.C.J. Reports 1959*, p. 6, p. 20. *See also Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Order of 19 September 2014, I.C.J. Reports 2014*, p. 478, p. 479 ("in accordance with Article 79, paragraph 5, of the Rules of Court, *the proceedings on the merits are suspended*, and it falls to the Court to fix a time-limit by which the Applicant [Nicaragua] might present a written statement of its observations and submissions on the preliminary objections. . .") (emphasis added).

12. As previously noted by the Court, "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits".[13] This is particularly important in circumstances in which, as here, the respondent State has not consented to the jurisdiction of the Court to consider a complaint about the acts that form the basis of the application brought before it. As consistently recalled by the Court[14] and its predecessor,[15] it is a "fundamental principle that no State may be subject to its jurisdiction without its consent".[16]

13. The submissions made to this Court by the parties, and equally before the CERD Committee, demonstrate in no uncertain terms the existence of a dispute between them regarding Qatar's financing and support of extremism and terrorism, Qatar's interference in the internal affairs of its neighbouring States and other regional States, in particular Libya, Egypt, Syria and Yemen, and Qatar's incitement of hatred and extremist violence through its State-owned and State-controlled media (notably *Al Jazeera Arabic*). Qatar has not, however, submitted that dispute to the Court for resolution. Indeed, it seeks to avoid addressing that

[13] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, p. 44.

[14] *See, e.g., Case of the Monetary Gold removed from Rome in 1943 (Italy v. France; United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1954*, p. 19, p. 32; *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment of May 26th, 1959, I.C.J. Reports 1959*, p. 127, p. 142.

[15] *See, e.g., Mavrommatis Palestine Concessions, Judgment, 1924, P.C.I.J., Series A, No. 2, August 30th 1924*, p. 6, p. 16; *Serbian Loans, Judgment, 1929, P.C.I.J., Series A, No. 20*, p. 5, pp. 16-17; *Phosphates in Morocco, Judgment of June 14th 1938, P.C.I.J., Series A/B, No. 74*, p. 17, p. 23.

[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, p. 76, para. 76; *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. 412, p. 423, para. 33.

dispute and goes so far as asserting that, against overwhelming evidence, any such allegations against it are "wild and incorrect", and merely "pretextual".[17]

14. Instead, following the implementation of the lawful and reasonable measures the UAE has taken to respond to Qatar's egregious conduct (including the establishment of entry requirements – such as those commonly in place in States around the world – for citizens of Qatar wishing to enter into the UAE), Qatar has manufactured the dispute it has put before the Court in an effort to re-frame the real dispute between it and the UAE as one in which Qatar and its citizens are the victims and objects of aggression including, improbably, racial discrimination, rather than one in which Qatar is the source of conflict. As a manufactured and wholly artificial dispute, however, Qatar cannot hide the obvious jurisdictional defects of its case, nor the evident reality that it is attempting to use the CERD as a vehicle to "pursue political ends" rather than to give "succour to the oppressed".[18]

15. The artificiality of Qatar's case and the concocted manner in which it was brought give rise to three independent preliminary objections. They are, in summary:

a) The dispute as submitted by Qatar is premised on its theory that certain acts of the UAE allegedly constitute discrimination against citizens of Qatar on the basis of their "national origin". This theory conflates

[17] *See The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Response of the State of Qatar, 14 February 2019, para. 16 (**Annex 18**).

[18] It is to be noted that during the preparatory work of the Convention, and specifically in the discussion of the provisions related to measures of implementation, the potential use of the CERD by a State to "pursue political ends" against another State was specifically warned against by various delegates. For example, 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." *Third Committee, 1346th meeting*, 17 November 1965, doc. A/C.3/SR.1346, p. 331, para. 21 (**Annex 20**). Another delegate feared that "[s]ome Governments would no doubt find it impossible to resist the temptation of using the international machinery for political ends". *Third Committee, 1347th meeting*, 18 November 1965, doc. A/C.3/SR.1347, p. 338, para. 32 (**Annex 21**).

differentiation based on nationality (as equivalent to citizenship[19]) with racial discrimination on the basis of "national origin". The Convention applies only to "racial discrimination", which is defined in Article 1(1) of the CERD as including discrimination on the basis of "race, colour, descent, or national or ethnic origin". By contrast, it does not apply to differentiation on the basis of *nationality*, which is a different concept from "national . . . origin". The alleged acts of which Qatar complains as violations of the CERD (including in particular collective expulsion of Qataris from the UAE and a ban on Qataris entering the UAE) would, if implemented (which they have not been), have been directed against citizens of Qatar on the basis of their *nationality*. They would not have been directed at any individuals on the basis of any particular *national or ethnic origin*. The acts alleged by Qatar therefore do not fall within the scope of the Convention and the Court thus has no jurisdiction *ratione materiae* under Article 22 of the Convention.

b) The consent of States Parties to the CERD to submit disputes to the Court with respect to the interpretation or application of the CERD is subject to two preconditions under Article 22 of the Convention, which is the sole basis on which Qatar seeks to found the jurisdiction of the Court. The Court could only have jurisdiction under Article 22 of the Convention if negotiation and the procedures provided under Articles 11 to 13 of the Convention have both been pursued as far as possible and neither has resulted in settlement of the dispute. Qatar failed to satisfy either of these preconditions before filing its Application. This further confirms that the Court has no jurisdiction over Qatar's Application.

c) The initiation of parallel proceedings before the Court in respect of the same dispute whilst the Article 11 procedure was pending before the CERD Committee constitutes an abuse of process, rendering Qatar's Application inadmissible.

16. These three independent preliminary objections are developed in turn in Sections III, IV and V, respectively, of this submission. Before addressing those preliminary objections, and purely by way of context, Section II further explains the artificiality of Qatar's case and the misrepresentations it has asserted

[19] *See, e.g.*, Lassa Oppenheim, *International Law*, (8th ed., Longmans, Green & Co. 1955), p. 645 ("'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."). *See* paras. 54, 66, 76, 94, *infra*.

in an effort to promote that artificial case. Section VI contains the UAE's formal submission, respectfully requesting the Court to adjudge and declare that it does not have jurisdiction over Qatar's Application and that the Application is inadmissible.

II. FACTUAL BACKGROUND: QATAR'S CASE IS FATALLY FLAWED

A. THE REAL DISPUTE BETWEEN THE PARTIES CONCERNS QATAR'S BREACHES OF ITS INTERNATIONAL OBLIGATIONS

17. In its Application, Qatar contends that its claims concern "discriminatory measures" allegedly taken by the UAE against citizens of Qatar in violation of the CERD.[20] It suggests that the alleged acts of the UAE were caused by a "fake news" story published in May 2017, in which the Emir of Qatar was said to have criticised the U.S. President and to have made comments in support of Iran.[21] Qatar claims that the UAE responded to that news story by carrying out certain acts in breach of its obligations under the CERD, in particular the "collective expulsion" of all Qataris from UAE territory (the UAE "expelled all Qataris within its borders, without exception")[22] and the imposition of a travel ban on Qataris entering UAE territory ("the ban on entry of Qataris to the UAE"),[23] measures that, according to its Agent's speech during the hearing which took place on 27-29 June 2018 in connection with Qatar's Request for Provisional Measures, "remain in effect to this day."[24]

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[20] *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.

[21] *Id*., para. 21.

[22] *Id*., para. 3.

[23] *Id*., paras. 3, 40 ("blanket restrictions on Qatari travel") and 46 ("As they cannot enter the UAE, Qataris are prevented from physical access to UAE courts and institutions").

[24] *Id*., para. 3.

18. These statements are false. While the UAE (along with a number of other States)[25] severed diplomatic relations with Qatar in June 2017, imposed requirements for the entry or re-entry of citizens of Qatar into the UAE and took certain other measures in relation to Qatar,[26] Qatar's claims that its citizens were "collectively expelled" or prohibited from entering the UAE (the "blanket travel ban"), or that any of such measures constitute violations of the CERD, are plainly untrue.[27]

19. The UAE has previously explained to the Court the reasons the UAE severed diplomatic relations with Qatar in June 2017 and took certain other measures against it.[28] The history of events leading to this rupture goes far beyond the purpose of this submission and the UAE shall not repeat that history here except to remind the Court of the salient points related to the agreements Qatar entered into in 2013-2014 under which it undertook to cease its funding, promotion and other support for violent extremists and terrorists who had become a threat to regional stability (the "**Riyadh Agreements**"[29]).

[25] *See* para. 30, *infra*.

[26] These measures, including restricting access of Qatari registered aircraft to UAE airspace and closing UAE ports to Qatari-flagged vessels, are not at issue in this case. *See* para. 33, *infra*.

[27] *See* paras. 41-52, *infra*.

[28] *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, 28 June 2018 at 10 a.m., pp. 11-12, paras. 4-8 (Alnowais) and *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, 29 June 2018 at 4:30 p.m., p. 38, para. 10 (Goldsmith) and pp. 43-44, paras. 4-7 (Alnowais).

[29] Riyadh Agreement, 23 and 24 November 2013, United Nations Registration Number 68881 (**Annex 1**); Mechanism Implementing the Riyadh Agreement, 17 April 2014, United Nations Registration Number 68882 (**Annex 2**); Supplementary Riyadh Agreement, 16 November 2014, United Nations Registration Number 68883 (**Annex 3**).

1. By Entering into the Riyadh Agreements, Qatar Committed to Cease its Support for Extremism

20. It is no secret that Qatar was implicated in widespread extremist and terrorist funding and support throughout the period 2011-2013 as well as subsequently.[30] In light of its refusal to cease that support, to halt its interference in the affairs of GCC and other States in the region, notably Egypt, Libya and Syria, or to prevent its State-owned and State-controlled media (particularly the Arabic language channels of *Al Jazeera*) from inciting hatred and extremist violence in the region by serving as the media platform of choice for extremist views,[31] the UAE and other members of the GCC decided to engage collectively with Qatar. As a result of this engagement, in 2013 and 2014 Qatar and the other

[30] *See, e.g.*, Mark Mazzetti, C.J. Chivers and Eric Schmitt, "Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels", *The New York Times*, 29 June 2013, available at: https://www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-in.html (**Annex 62**); United States Department of Treasury Press Release, "Treasury Designates Al-Qa'ida Supporters in Qatar and Yemen", 18 December 2013, available at: https://www.treasury.gov/press-center/press-releases/pages/jl2249.aspx (**Annex 153**); Jonathan Schanzer, "Confronting Qatar's Hamas Ties", *Politico*, 10 July 2013, available at: https://www.politico.com/story/2013/07/congress-qatar-stop-funding-hamas-093965 (**Annex 63**).

[31] Eli Lake, "Al-Jazeera and the Muslim Brotherhood", *Asharq Al-Awsat*, 25 June 2017, available at: https://eng-archive.aawsat.com/eli-lake/opinion/al-jazeera-muslim-brotherhood (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 network coordinates and takes directions from the [Qatari] government, the more it became a mouthpiece for Qatari intelligence... There are many channels who are biased, but this is past bias. Now Al-Jazeera is a voice for terrorists.") (**Annex 64**); 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 (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." Other examples of Al Jazeera's highly problematic broadcasting include one of its most prominent journalists openly expressing 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, which was reported as having been so favorable that it has been described as Qatar's "infomercial" for the terrorist group.) (**Annex 65**).

GCC States entered into a series of agreements that would come to be known as the Riyadh Agreements.

21. At the time of the conclusion of the Riyadh Agreements, the GCC States already had existing obligations under international law concerning counter-terrorism, including under international conventions,[32] relevant UN Security Council resolutions,[33] and customary international law. Through the Riyadh Agreements, the GCC States gave specific additional undertakings:

(a) not to interfere in each other's internal affairs, including by not providing financial or other support to individuals or groups inciting violence or hatred towards GCC States, not allowing such individuals to use GCC State-owned or State-controlled media as a platform to express their views, and by banning any organisations or groups that were hostile towards GCC States;[34]

(b) not to support the Muslim Brotherhood, and to deport Muslim Brotherhood figures who were not citizens of any of the GCC States;[35]

(c) not to do anything that would weaken the security and stability of the Arab Republic of Egypt, including by ensuring that *Al Jazeera* and related networks, in particular *Al Jazeera's* Arabic language

[32] *See*, *e.g.*, International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, *UNTS*, vol. 2178, p. 197; Arab Convention on the Suppression of Terrorism, Cairo, 22 April 1998; Convention of the Organization of the Islamic Conference on Combating International Terrorism, Ouagadougou, 1 July 1999; GCC Anti-Terrorism Agreement, Kuwait City, 4 May 2004; Security Agreement Between the States of the Gulf Cooperation Council, Riyadh, 13 November 2012.

[33] *See* United Nations, Security Council, Resolutions 1373 (2001), 28 September 2001, paras. 2(c), (d), (e) and (g) (**Annex 4**) and 1624 (2005), 14 September 2005 (**Annex 5**). *See also* United Nations, Security Council, Resolutions 2133 (2014), 27 January 2014 (**Annex 6**); 2178 (2014), 24 September 2014 (**Annex 7**); 2396 (2017), 21 December 2017 (**Annex 8**).

[34] Riyadh Agreement, 23 and 24 November 2013, United Nations Registration Number 68881, Article 1 (**Annex 1**); Mechanism Implementing the Riyadh Agreement, 17 April 2014, United Nations Registration Number 68882, Articles 1, 2(d)-(e) (**Annex 2**); Supplementary Riyadh Agreement, 16 November 2014, United Nations Registration Number 68883, Article 3(c) (**Annex 3**).

[35] Riyadh Agreement, 23 and 24 November 2013, United Nations Registration Number 68881, Article 2 (**Annex 1**); Mechanism Implementing the Riyadh Agreement, United Nations Registration Number 68882, 17 April 2014, Article 2 (a)-(b) (**Annex 2**).

channels, would cease airing antagonistic media content directed against Egypt;[36] and

(d) not to support any political or militia groups in Yemen, Syria or any other country lacking political stability, if those groups could pose a threat to the security and stability of GCC States.[37]

22. These undertakings were supported by an implementation mechanism through which GCC States could meet and discuss complaints regarding non-compliance with the Riyadh Agreements.[38] The Riyadh Agreements also confirmed the rights of the GCC States to take any appropriate measures to protect their security and stability by the inclusion of the following provision: "If any country of the GCC countries fails to comply with this mechanism, *the other GCC countries shall have the right to take any appropriate action to protect their security and stability*."[39] Thus, Qatar was on notice that its conduct and compliance with the Riyadh Agreements would be continuously monitored and that appropriate action would be taken against it if it failed to live up to its commitments. Unfortunately, that is exactly what happened.

2. Qatar has Continued Supporting Extremism, Failing to Abide by its Commitments

23. Despite the terms of the Riyadh Agreements, Qatar continued to violate its obligations under international law.[40] Qatar notably failed to prosecute

[36] Supplementary Riyadh Agreement, 16 November 2014, United Nations Registration Number 68883, Article 3(d) (**Annex 3**).

[37] Riyadh Agreement, 23 and 24 November 2013, United Nations Registration Number 68881, Article 3 (**Annex 1**); Mechanism Implementing the Riyadh Agreement, 17 April 2014, United Nations Registration Number 68882, Article 2(c) (**Annex 2**).

[38] Mechanism Implementing the Riyadh Agreement, 17 April 2014, United Nations Registration Number 68882 (**Annex 2**).

[39] *Id.*, Article 3 (**Annex 2**) (emphasis added).

[40] Jody Warrick and Tik Roof, "Islamic charity officials gave millions to al-Qaeda, U.S. says", *Washington Post*, 22 December 2013, available at: https://www.washingtonpost.com/world/national-security/islamic-charity-officials-gave-millions-to-al-qaeda-us-says/2013/12/22/e0c53ad6-69b8-11e3-a0b9-

designated terrorists living in and operating from within Qatar.[41] It also continued to openly support the Muslim Brotherhood and to undermine Egypt's stability,[42] including by providing the Muslim Brotherhood with a platform on *Al Jazeera*[43] and by harbouring its leader, Yusuf Al-Qaradawi.[44]

24. Indeed, 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,[45] the Al-Nusra Front,[46] ISIS,[47]

249bbb34602c_story.html?noredirect=on&utm_term=.33b1781124ca (**Annex 66)**; 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 (**Annex 154**).

[41] Alessandra Gennarelli, "Egypt's Request for Qatar's Extradition of Sheikh Yusuf Al-Qaradawi", *Center for Security Policy*, 27 May 2015, available at: https://www.centerforsecuritypolicy.org/2015/05/27/egypts-request-for-qatars-extradition-of-sheikh-yusuf-al-qaradawi/ (**Annex 67**).

[42] *See, e.g.*, the Egyptian Court of Cassation judgment confirming that, between 2011 and 2013, former President Morsi and other leaders of the then Muslim Brotherhood Government were paid by Qatari intelligence agents to disclose military and secret information relating to Egypt: *Morsi and others v. Public Prosecution*, Case No 32611, Judgment of the Court of Cassation of the Arab Republic of Egypt (Criminal Chamber), 16 September 2017 (**Annex 102**).

[43] Transcript of Yusuf Al-Qaradawi Interview, "Sharia and Life", *Al-Jazeera Television*, 17 March 2013, transcript (**Annex 68**).

[44] *Note Verbale* to the Ministry of Foreign Affairs of the State of Qatar from the Embassy of the Arab Republic of Egypt in Doha, 21 February 2015 (**Annex 48**); "Amir Hosts Iftar banquet for scholars, judges and imams", *Gulf Times*, 30 May 2018, available at: https://www.gulf-times.com/story/594565/Amir-hosts-Iftar-banquet-for-scholars-judges-and-i (**Annex 69**).

[45] United Nations Security Council, ISIL (Da'esh) and Al-Qaida Sanctions Committee, Narrative Summaries of Reasons for Listing Khalifa Muhammad Turki Al-Subai (QDi.253), 3 February 2016 (**Annex 9**).

[46] 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) (**Annex 154**).

[47] *Id*.

the Muslim Brotherhood,[48] various Iranian-backed militias[49] and extremist groups operating in Syria, Libya, Egypt and other States;[50] and reveal that Qatar has continued to give sanctuary to dangerous extremists listed on U.N. and other terrorist sanctions lists.[51] Qatar has also been accused of distributing millions of dollars raised by Qatar-located "charities" to extremist groups;[52] and reports 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.[53]

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[48] 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.") (**Annex 70**).

[49] 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") (**Annex 71**).

[50] "Egypt: Qatar is the Main Funder of Terrorism in Libya", *Asharq Al-Awsat*, 28 July 2017, available at: https://aawsat.com/print/962246 ("Ambassador Tariq Al-Qouni, Assistant Foreign Minister for Arab Affairs, said that Qatar is the main financier to terrorist groups and organizations in Libya… During a meeting on Tuesday with the participation of all UN member states in New York, Al-Qouni reviewed Qatar's support for terrorism in Libya, referring to the impact of terrorism on the situation in Libya and [stating] that it has become a safe haven for terrorism.") (**Annex 72**); "New Human Rights Report Accuses Qatar of 'Harbouring Terrorism in Libya'", 24 August 2017, *Asharq Al-Awsat*, available at: https://aawsat.com/print/1006966 (**Annex 73**); 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 (**Annex 74**).

[51] "'Wanted Terrorist' finished second in Qatar triathlon", *The Week*, 28 March 2018, available at: https://www.theweek.co.uk/odd-news/92582/wanted-terrorist-finishes-second-in-qatar-triathlon (**Annex 75**); United Nations Security Council, ISIL (Da'esh) and Al-Qaida Sanctions Committee, Narrative Summaries of Reasons for Listing Khalifa Muhammad Turki Al-Subai (QDi.253), 3 February 2016 (**Annex 9**).

[52] 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-i.ts-growing-influence-in-levant-pub-55514 (**Annex 76**).

[53] 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 (**Annex 77**); Christian Chesnot and Georges Malbrunot, *Nos Très Chers*

25. Its support for extremist groups in Libya has been repeatedly pointed out by numerous sources, including foreign diplomats,[54] NGOs[55] and the Libyan army,[56] among others. Likewise, Qatar has been repeatedly criticized — in particular by the United States — for funding and supporting extremist Iran-backed militias in the MENA region.[57] In Syria, Qatar's support for a range of

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Émirs, French and European Publications Inc., 25 October 2016 (in French) at pp. 141-143 ("Depuis une dizaine d'années, dans une bonne dizaine de cas d'enlèvements, le Qatar a réglé la facture au profit des preneurs d'otages. La totalité de l'argent ainsi versé à al-Nosra avoisinerait les 150 millions de dollars.") (**Annex 78**).

[54] "Egypt: Qatar is the Main Funder of Terrorism in Libya", *Asharq Al-Awsat*, 28 July 2017, available at: https://aawsat.com/print/962246 (**Annex 72**).

[55] *See also* "New Human Rights Report Accuses Qatar of 'Harbouring Terrorism in Libya'", *Asharq Al-Awsat*, 24 August 2017, available at: https://aawsat.com/print/1006966 ("The latest Libyan human rights report accused the State of Qatar of supporting terrorism. The report prepared by the Libyan 'Justice First' Organization, which is headquartered in Cairo, mentioned that it has put all its reports and information on the Libyan entities and individuals on the list of Arab countries at the disposal of the counterterrorism authorities.") (**Annex 73**).

[56] 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 ("Brigadier General Ahmed Al Mesmari, spokesman for the Libyan National Army… gave some sharp public criticism to Turkey and Qatar and accused them in the press conference held the evening of the day before yesterday in Bangazi (east) to be supporting extremists and terrorists and of having spent huge amounts to change the Libyan state's demographics. [He] confirmed that the military has evidence, documents and records of the meetings held by terrorists in Turkey, Qatar, and Tunisia") (**Annex 74**).

[57] "The White House Invites Qatar to Stop Funding Militias", *Asharq Al-Awsat*, 13 May 2018, available at: https://aawsat.com/print/1266656 ("13 days after the 'Washington Post' reported the leakage of letters from Qatar proving that Doha paid more than one billion dollars to extremist militias in Syria and Iraq, The Telegraph made public yesterday that the American Administration invited Doha to refrain from funding militias directly linked to Iran… US security officials have expressed concern that Qatar is linked to a number of Iranian-sponsored militias, many of which Washington classifies as terrorist.") (**Annex 79**); *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 ("The administration of the US President requested Qatar to stop financing Iran's militias, after disclosing Doha's association with a terrorist group in the Middle East. US security officials have expressed concern about Qatar's association with a number of Iranian-sponsored militias, many of which are classified by Washington as terrorist groups and organizations. The British *Telegraph* confirmed that Washington's request to Qatar to stop supporting and financing terrorist groups, came after the disclosure of a number of emails, sent by senior officials in the Qatari government to leading members of organizations such as 'Hezbollah' militia backed by Iran, located in southern Lebanon, and to senior commanders of the Iranian Revolutionary Guards. The e-mails, seen by the *Telegraph*, show that members of senior Qatari government officials have friendly relations with prominent Revolutionary Guard figures such as

extremist and terrorist groups, including ISIS and the Al-Nusra Front,[58] 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 them as terrorists, or bracketing them as Al Qaeda" given Qatar's necessity of removing Bashar Al Assad at all costs.[59]

26. A number of meetings were held in implementation of the Riyadh Agreements. The minutes of these meetings 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".[60]

27. The minutes from a subsequent meeting held a month and a half later following yet another round of diplomacy in which once again Qatar agreed to mend its ways confirmed the nature of the very core issues in dispute between Qatar and its GCC neighbours and that it was hoped that, unlike on previous occasions when Qatar's commitments were not implemented, Qatar would this

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Qassim Soleimani, the influential leader of the Iranian Jerusalem Force, and Hassan Nasrallah, the leader of Hezbollah." (**Annex 80**).

[58] "Al-Nosra, the Qatari Terrorist Arm in Syria", *Sky News Arabia*, 17 June 2017, available at: https://www.skynewsarabia.com/video/957485 (**Annex 81**).

[59] Elizabeth Dickinson, "The Case Against Qatar", *Foreign Policy*, 30 September 2014, available at: https://foreignpolicy.com/2014/09/30/the-case-against-qatar/ (**Annex 82**).

[60] Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014 (**Annex 50**).

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 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.*[61]

28. 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 crisis 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

[61] Summary of Discussions in the Sixth Meeting of their Highnesses and Excellencies the Ministers of Foreign Affairs, Jeddah, 30 August 2014 (emphasis added) (**Annex 51**).

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.

29. But while the GCC States repeatedly called Qatar's attention to its failure to comply with its international obligations,[62] Qatar continued to violate those obligations.[63] For instance, on 3 April 2017, it was widely reported that Qatar paid US$1 billion as a "ransom" to entities affiliated with known terrorist organisations, including Al Qaeda.[64]

[62] Ministry of Foreign Affairs of the Kingdom of Bahrain, News Details, "A Statement Issued by the Kingdom of Saudi Arabia, the United Arab Emirates and the Kingdom of Bahrain", 5 March 2014 (**Annex 49**); Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014 (**Annex 50**); Summary of Discussions in the Sixth Meeting of their Highnesses and Excellencies the Ministers of Foreign Affairs, Jeddah, 30 August 2014 (**Annex 51**).

[63] *See, e.g.*, Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014 (**Annex 50**); Security Council, Al-Qaida Sanctions Committee, Narrative Summaries of Reasons for Listing Abd al-Latif bin Abdallah Salih Muhammad al-Kawari (QDi.380), 21 September 2015, available at: http://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/individual/abd-al-latif-bin-abdallah-salih-muhammad-al (**Annex 10**); Security Council, Al-Qaida Sanctions Committee, Narrative Summaries of Reasons for Listing Sa'd bin Sa'd Muhammad Shariyan al-Ka'bi (QDi.382), 21 September 2015, available at: https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/individual/sa%27d-bin-sa%27d-muhammad-shariyan-al-ka%27bi (**Annex 11**); "Al-Nusra Leader Jolani Announces Split from al-Qaeda", *Al Jazeera*, 29 July 2016, available at: https://www.aljazeera.com/news/2016/07/al-nusra-leader-jolani-announces-split-al-qaeda-160728163725624.html (**Annex 83**).

[64] "'Billion Dollar Ransom': Did Qatar Pay Record Sum?", *BBC*, 17 July 2018, available at: https://www.bbc.co.uk/news/world-middle-east-44660369 (**Annex 84**); Patrick Cockburn, "Iraq Considers Next Move After Intercepting 'World's Largest' Ransom for Kidnapped Qataris", *Independent*, 26 April 2017, available at: https://www.independent.co.uk/news/world/middle-east/qatari-royals-kidnapped-iraq-ransom-half-billion-shia-militia-syria-saudi-hunters-baghdad-a7703946.html (**Annex 85**); Joby Warrick, "Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages", *The Washington Post*, 28 April 2017, available at: https://www.washingtonpost.com/world/national-security/hacked-messages-show-qatar-appearing-to-pay-hundreds-of-millions-to-free-hostages/2018/04/27/46759ce2-3f41-11e8-974f-aacd97698cef_story.html?utm_term=.1300fb488380 (**Annex 86**).

B. THE UAE'S RESPONSE WAS LAWFUL

30. It was in this context that, on 5 June 2017, the Ministry of Foreign Affairs and International Cooperation of the UAE issued a statement (the "**5 June 2017 Statement**") announcing certain measures to be taken in response to Qatar's violations of international law.[65] Simultaneously, at least ten other States — including but not limited to several other GCC States — terminated or limited their relationship with Qatar. These States included Bahrain,[66] Egypt[67] and Saudi Arabia,[68] which, along with the UAE,[69] all announced that they would be taking action against Qatar.

31. In the 5 June 2017 Statement, the UAE announced:[70]

> The UAE affirms its complete commitment and support to the Gulf Cooperation Council and to the security and stability of the GCC States. Within this framework, and based on the insistence of the State of Qatar to continue to undermine the security and stability of the region and its failure to honour international commitments and agreements, it has been decided to take the following measures that are necessary for safeguarding the interests of the GCC States in general and those of the brotherly Qatari people in particular:
>
> 1-In support of the statements issued by the sisterly Kingdom of Bahrain and sisterly Kingdom of Saudi Arabia, the United Arab Emirates severs all relations with the State of Qatar, including breaking off diplomatic relations, and gives Qatari diplomats 48 hours to leave the UAE.

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[65] "UAE supports statements of Kingdom of Bahrain and Kingdom of Saudi Arabia on Qatar", UAE Ministry of Foreign Affairs, 5 June 2017 (**Annex 52**).

[66] Declaration of the Kingdom of Bahrain, 5 June 2017 (**Annex 53)**.

[67] Declaration of the Arab Republic of Egypt, 4 June 2017 (**Annex 54**).

[68] Declaration of Kingdom of Saudi Arabia, 5 June 2017 (**Annex 55**).

[69] Declaration of the United Arab Emirates, 5 June 2017 (**Annex 56**).

[70] *Id.* The English version of numbered paragraph 2 in the 5 June 2017 Statement translated *almuatinin* /المواطنين from the Arabic version of the 5 June 2017 Statement as Qatari "nationals". An equally correct translation would have been "citizens".

2-Preventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.

3-Closure of UAE airspace and seaports for all Qataris in 24 hours and banning all Qatari means of transportation, coming to or leaving the UAE, from crossing, entering or leaving the UAE territories, and taking all legal measures in collaboration with friendly countries and international companies with regards to Qataris using the UAE airspace and territorial waters, from and to Qatar, for national security considerations.

The UAE is taking these decisive measures as a result of the Qatari authorities' failure to abide by the Riyadh Agreement on returning GCC diplomats to Doha and its Complementary Arrangement in 2014, and Qatar's continued support, funding and hosting of terror groups, primarily Islamic Brotherhood, and its sustained endeavours to promote the ideologies of Daesh and Al Qaeda across its direct and indirect media in addition to Qatar's violation of the statement issued at the US-Islamic Summit in Riyadh on May 21st, 2017 on countering terrorism in the region and considering Iran a state sponsor of terrorism. The UAE measures are taken as well based on Qatari authorities' hosting of terrorist elements and meddling in the affairs of other countries as well as their support of terror groups—policies which are likely to push the region into a stage of unpredictable consequences.

While regretting the policies taken by the State of Qatar that sow seeds of sedition and discord among the region's countries, the UAE affirms 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.

32. Although the 5 June 2017 Statement announced a decision to give Qatari nationals 14 days to leave UAE territory for precautionary security reasons and to prevent the travel of Qatari nationals into the UAE, the UAE did not (as explained below) then issue any deportation or expulsion order or institute a travel ban.

33. The UAE did implement the following measures:

(a) Diplomatic relations with Qatar were severed, and Qatar's diplomats were expelled.

(b) Additional requirements were imposed for entry or re-entry into the UAE by citizens of Qatar. Citizens of Qatar are now required to obtain prior permission to travel to the UAE. To facilitate and receive applications for entry and re-entry by citizens of Qatar, the UAE established a "hotline" telephone service operated by the UAE's Ministry of Interior and, as of the second half of 2018, a dedicated section of its website for such citizens of Qatar to apply for entry permits.[71]

(c) Access to the airspace over the UAE was restricted for aircraft registered in Qatar.[72]

(d) UAE ports were closed to vessels that are Qatari-flagged or owned by companies incorporated in Qatar or individuals holding Qatari citizenship. At UAE ports the loading or unloading of cargo of Qatari origin was restricted, as was the loading of cargo of UAE origin onto ships travelling to Qatar.[73]

(e) Accounts linked to terrorist funding held in banks and other financial institutions operating in the UAE were frozen, and rigorous "customer due diligence" checks were imposed on accounts held by six Qatari banks in the UAE, in order to prevent

[71] UAE Ministry of Foreign Affairs and International Cooperation Announcement, Directive for Hotline Addressing Mixed Families, 11 June 2017 (**Annex 57**); Exhibit 3 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 Request for the Indication of Provisional Measures (Part 1 Report of Abu Dhabi Police on Hotline, Real Estate, Funds, Licenses and Immigration, 20 June 2018), p. 2; Federal Authority For Identity & Citizenship website, available at: https://beta.echannels.moi.gov.ae; Screen-shots of the Federal Authority For Identity & Citizenship's website (explaining the procedure for applying for permission to enter the UAE) (**Annex 155**). *See also* Federal Authority For Identity & Citizenship website, available at: https://echannels.moi.gov.ae (by which Qatari citizens can apply for a permit to return to the UAE).

[72] *See* UAE General Civil Aviation Authority, Notice to Airmen A0812/17, 5 June 2017 (**Annex 89**); UAE General Civil Aviation Authority, Notice to Airmen A0848/17, 12 June 2017 (**Annex 90**). Contingency routes and related arrangements were made to avoid unnecessary disruption of air traffic as a result of the airspace restrictions. UAE airspace and airports remain open to Qatar-registered aircraft in cases of emergency.

[73] UAE Federal Transport Authority, Circular No 2/2/1023, 11 June 2017 (**Annex 91**).

those accounts from being used to finance terrorist or extremist activities.[74]

34. These reasonable and proportionate measures were adopted with the aim of inducing Qatar to comply with its obligations under international law.

C. QATAR'S CASE AND THE ISSUES WHICH DIVIDE THE PARTIES

35. Broken down to its essential elements, as set out in the Application and as elaborated in the oral pleadings of Qatar during the hearing on its Request for Provisional Measures, Qatar's case under the CERD, including its jurisdictional aspects, is based on four pillars:

(a) *First*, Qatar contends that in June 2017 the UAE carried out the collective expulsion of all Qataris from the UAE and banned entry into the UAE of all Qataris.[75]

(b) *Second*, Qatar contends that, as a result of the expulsion of its citizens from the UAE and the ban on their entry to the UAE, Qataris were deprived of various rights which cannot be exercised

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[74] *See, e.g.*, UAE Central Bank, Circular No 156/2017, 9 June 2017 (**Annex 92**).

[75] *See, e.g.*, *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 and Request for the Indication of Provisional Measures of Protection, 11 June 2018, para. 2 ("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*") (emphasis added); *id.*, 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 (Al-Khulaifi) ("*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 (emphasis added) ("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."); *see also The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, para. 4 ("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.") (**Annex 12**) (emphasis added); *id.*, Response of the State of Qatar, 14 February 2019, para. 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.") (**Annex 18**) (emphasis added).

without having access to the UAE, including the right to mixed Qatari-Emirati marriage and family life, the right to work in the UAE, access to medical care in the UAE, access to education in the UAE, access to property and businesses in the UAE and access to courts and tribunals in the UAE.

(c) *Third*, Qatar contends that the deprivation of these rights for Qataris through *their* collective expulsion and ban on entry constitutes *racial discrimination* as defined in Article 1(1) of the CERD. Thus, Qatar regards this as a violation of the CERD, because these "measures" exclusively "targeted" Qataris and, crucially for Qatar's argument, because "targeting" persons having Qatari nationality is the same as "targeting" persons because of their "national . . . origin", which constitutes racial discrimination under the CERD.

(d) *Fourth*, Qatar contends that the UAE has failed to condemn and instead encouraged racial hatred against Qatar and Qataris and failed to "take measures that aim to combat prejudices, including by *inter alia*: criminalizing the expression of sympathy toward Qatar and Qataris; allowing, promoting, and financing an international anti-Qatar public and social-media campaign; silencing Qatari media; and calling for physical attacks on Qatari entities."[76]

(e) *Fifth*, Qatar contends that it was entitled to bring its claim to the Court under Article 22 of the Convention on the basis of an alleged failed negotiation with the UAE over the dispute (one of the two preconditions of Article 22), without also having first exhausted the other precondition set out in Article 22, *i.e.*, the procedures set out in Articles 11-13 of the CERD.[77]

36. The UAE rejects each of these allegations. Qatar's contention that Qataris were collectively expelled (or expelled at all) and that a ban on their entry to the UAE exists is plainly false.[78] The only measure the UAE has taken in

[76] *See 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, paras. 24-25, 60, 65.c.

[77] *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), pp. 24-31, paras. 22-44 (Donovan).

[78] *See* para. 41, *infra*.

relation to citizens of Qatar was to establish entry requirements to enter the UAE, a system — accessible through a telephone hotline and a website — which has been used by thousands of citizens of Qatar to continue entering and departing the UAE since June 2017.[79] No additional requirements were imposed for citizens of Qatar residing in the UAE in June 2017 to continue doing so.[80] As no expulsion and no ban on entry have been imposed, Qatar's allegations regarding the deprivation of rights of its citizens in the UAE, which are premised on the fictitious expulsion and entry ban, have no foundation. Moreover, documentary records have been submitted to the Court to demonstrate that this supposed deprivation of rights — whether in relation to marriage and family life, medical care, education, businesses and property or access to courts and tribunals — is in any case false.[81]

37. These factual considerations and the background as to why the UAE broke off diplomatic relations with Qatar and took the other measures noted above (including the establishment of entry requirements for citizens of Qatar wishing to visit the UAE) are set out in this submission simply to provide relevant context for the Court to understand the origin of the dispute between the parties, to demonstrate the reasonable manner in which the UAE has responded to Qatar's violations of its international obligations and the actual circumstances of citizens of Qatar currently in the UAE or wishing to travel there rather than the false and concocted account Qatar has portrayed.

38. The third, fourth and fifth contentions of Qatar noted above are, however, of direct relevance to these preliminary objections. The reasons supporting the UAE's views on these points are set out in Sections III, IV and V below.

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[79] *See* para. 43, *infra*.

[80] *See* para. 42, *infra*.

[81] *See* para. 50, *infra*.

D. QATAR MISREPRESENTS THE RELEVANT FACTUAL CIRCUMSTANCES, INCLUDING ON THE RIGHTS OF QATARI CITIZENS RESIDING IN OR WISHING TO TRAVEL TO THE UAE

39. In its Application, Qatar alleges that the 5 June 2017 Statement resulted in an order expelling all Qataris ("without exception") from the UAE and banning citizens of Qatar from travelling to the UAE. As a consequence of these alleged acts, Qatar claims that the UAE has engaged in racial discrimination in breach of its obligations under the CERD.[82] Qatar similarly alleges that the UAE has failed to condemn and instead encouraged racial hatred against Qatar and Qatari citizens and has interfered with the exercise of freedom of expression by Qatari entities.[83]

40. Quite apart from the legal flaws in its case, Qatar's allegations lack any factual basis. In this submission, the UAE does not engage in detail with the merits of Qatar's allegations. Rather, it confines itself to noting for the record that, for the following reasons, Qatar's factual allegations are demonstrably false.

41. *First*, the UAE has not enacted any order for the expulsion of citizens of Qatar or any order banning their entry into the UAE. Indeed, the 5 June 2017 Statement could not effect such an expulsion. Under UAE law, the authority to order any expulsion or deportation rests with the Ministry of Interior.[84] Neither the Ministry of Interior nor any other organ of the UAE has ever issued any order or taken any other action declaring the presence within the UAE of Qataris as unlawful or compelling citizens of Qatar who are lawfully within the UAE to leave the territory. Given Qatar's allegations in this respect, it

[82] *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, paras. 3, 53-64.

[83] *Id.*

[84] Federal Law No. 6 concerning Immigration and Residence, 25 July 1973, Article 23 (**Annex 88**).

is perhaps ironic that, in contrast, Qatar's own authorities did issue instructions for its citizens to leave the UAE.[85]

42. On 5 July 2018, the UAE's Foreign Ministry confirmed that there was never any legal order expelling citizens of Qatar from the UAE, and that any citizen of Qatar could apply to enter the UAE on an individual basis and would be permitted to do so if they did not pose a security risk and otherwise met the ordinary immigration criteria:

> 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 . . . 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.[86]

43. Moreover, the UAE has submitted to the Court documentary evidence in the form of official government records establishing that Qatari citizens have, uninterruptedly since June 2017, entered and exited the UAE more than 11,000 times,[87] that more than 700 Qatari citizens who continue to reside in

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[85] "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/qatar-asks-citizens-to-leave-uae-within-14-days-embassy-idUSKBN18W1FT (**Annex 87**)

[86] Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation, 5 July 2018 (**Annex 58)**.

[87] *See* Exhibit 11 (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 Exhibit 14 (Immigration - Complete Entry-Exit Records) (showing movement of Qatari nationals entering and exiting the UAE in over 8,000 occasions) of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 Request for the Indication of Provisional Measures. *See also* 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) and Annex 1.2 ([Excel Redacted] Requests for Entry or Exit of Qatari Nationals from 9 July 2018 until 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) of

the UAE hold UAE identification documents,[88] and that the number of Qatari citizens residing in or visiting the UAE is not substantially different than the number of Qatari citizens who were present in the country prior to June 2017.[89]

44. The Court is asked to take note that neither in the proceedings before it in connection with Qatar's Request for Provisional Measures nor in connection with the proceedings before the CERD Committee has Qatar directly challenged that evidence with any credible rebuttal evidence. Instead, it merely 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.[90] Given that, as Qatar itself has repeatedly pointed out, many Qataris routinely visit the UAE for business, family or shopping excursions, the revelation that "a very large number" "appear" to be exiting the country should not be surprising.[91]

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the documents deposited by the UAE on 14 January 2019 in the context of the Supplemental Response of the United Arab Emirates on the Issues of Jurisdiction and Admissibility to the Communication made by the State of Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination (**Annex 17**).

[88] *See* 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) and Annex 1.3 ([Excel Redacted] Holders of UAE Resident Permits) of the documents deposited by the UAE on 14 January 2019 in the context of the Supplemental Response of the United Arab Emirates on the Issues of Jurisdiction and Admissibility to the Communication made by the State of Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination (**Annex 17**).

[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 28 June 2018, at 10:00 a.m. (CR 2018/13), p. 13, para. 14 (Alnowais).

[90] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Response of the State of Qatar, 14 February 2019, para. 119, n. 218 (**Annex 18**).

[91] *Id.*, para. 36.

45. Qatar also notes 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 the number of visits by citizens of Qatar to the UAE may have declined.[92] As the allegation Qatar has lodged against the UAE (presumably to attempt to characterize the UAE's conduct as a violation of the CERD) is that there is a *ban* on all Qataris entering the UAE, this response, acknowledging that there are indeed large movements of citizens of Qatar into and out of the UAE, does nothing to support Qatar's extreme, and false, contention, and in fact it directly contradicts it.

46. The UAE has also provided evidence showing that, as of January 2019, over 700 citizens of Qatar reside in the UAE and hold UAE identification documents.[93] Qatar attempts to question this by speculating that some of those Qatari citizens 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 have been a more than three-fold decrease in the number of Qataris residing in the UAE."[94] But, as Qatar well knows, this supposed "three-fold decrease" is a fabrication because it compares the number of Qatari citizens currently "residing" in the UAE with the number of Qatari citizens (residents and visitors) who were physically present in the UAE in June 2018.[95]

47. In connection with the alleged travel ban, prior to 5 June 2017, citizens of Qatar could — in the same way as nationals of other GCC States — travel to the UAE without a visa or any other prior permission. Following the

[92] *Id.*, para. 121.

[93] *See* n. 88, *supra*.

[94] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Response of the State of Qatar, 14 February 2019, para. 124, n. 232 (**Annex 18**).

[95] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Supplemental Response of the UAE on the Issues of Jurisdiction and Admissibility, 14 January 2019, para. 10 ("As of June 2018, the number of Qataris in the UAE amounted to 2,194.") (**Annex 17**).

5 June 2017 Statement, the UAE required citizens of Qatar to request permission to enter the UAE. Such a requirement is unexceptional. The need to obtain permission prior to entry to the UAE applies to the citizens of many other States and is a basic immigration control measure used by virtually every State. As already noted, thousands of Qatari citizens have travelled to and from the UAE on this basis since 5 June 2017.[96]

48. The mechanism used to regulate the issuance of entry permits for Qataris wishing to travel to the UAE was initially a telephone hotline.[97] While the telephone hotline may still be accessed, in the second half of 2018, the UAE Ministry of Interior set up special access for Qatari citizens on its official visa application website by which Qatari citizens could apply for a permit to enter the UAE.[98]

49. *Second*, all of Qatar's other allegations of violations of the CERD — in particular, of the right to equality before the law and to the enjoyment, without racial discrimination, of the right to marriage, to public health and medical care, to education, to work, to property, and to equal treatment before tribunals — are premised on Qatar's flawed and incorrect case that Qataris have been expelled from the UAE, and that a travel ban for Qataris was implemented. Qatar does not allege that the UAE has imposed any measure restricting in any

[96] *See* Exhibit 14 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 Request for the Indication of Provisional Measures. *See also* n. 87, *supra*.

[97] *See* Exhibit 2 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 Request for the Indication of Provisional Measures. *See also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order on the Request for the Indication of Provisional Measures, 23 July 2018, Dissenting Opinion of Judge Crawford, para. 6.

[98] *See* Federal Authority For Identity & Citizenship website, available at: https://beta.echannels.moi.gov.ae. *See also* Screenshots of the Federal Authority For Identity & Citizenship's website (explaining the procedure for applying for permission to enter the UAE) (**Annex 155**). *See also* Federal Authority For Identity & Citizenship website, available at: https://echannels.moi.gov.ae (by which Qatari citizens can apply for a permit to return to the UAE). *See* n. 71, *supra*.

way the enjoyment of such rights by citizens of Qatar. Moreover, it is important to note that Qatar openly acknowledges this. Thus, it has repeatedly stated that the alleged deprivation of such rights for Qataris is premised upon the allegation that they have been "collectively expelled" from the UAE and prohibited from entering the UAE:

(a) Regarding the alleged interference with marriage and choice of spouse, Qatar asserts this is due to the "collective expulsion of Qataris, recall from Qatar of Emiratis, and ban on entry of Qataris to the UAE".[99]

(b) Regarding the alleged infringement of the right to public health and medical care, Qatar states that "[t]he UAE's collective expulsion and blanket restrictions on Qatari travel included Qataris receiving essential medical treatment. As a result, Qataris requiring medical attention in the UAE that is not available in Qatar have been denied necessary care, as have Qataris in the UAE who have been prohibited from continuing their course of medical treatment."[100]

(c) Regarding the alleged inability to access UAE courts or tribunals, Qatar states that "[a]s they cannot enter the UAE, Qataris are prevented from physical access to UAE courts and institutions".[101]

(d) Regarding the alleged deprivation of the right to education, Qatar states that "[b]y expelling Qataris from the UAE and prohibiting Qatari travel to the UAE, the UAE is barring Qataris who previously studied in the country from continuing their education there."[102]

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[99] *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. 40, para. 29 (Amirfar).

[100] *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. 40.

[101] *Id.*, para. 46.

[102] *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. 43, para. 38 (Amirfar).

(e) Regarding the alleged deprivation of the right to work and ownership of property, Qatar states that "[t]hrough its collective expulsion and ban on entry of Qataris, the UAE is preventing Qataris working in the UAE from continuing their employment."[103]

(f) Regarding the alleged "interference" with the right of property ownership, Qatar states that this has been the result of "Qataris hav[ing] been unable to visit their residential or commercial properties in the UAE since the UAE's collective expulsion of Qataris in June 2017."[104]

50. Since there was no expulsion order and *a fortiori* no "collective expulsion", and there was and is no travel ban, it follows that these allegations are baseless. Indeed, 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 citizens of Qatar or deprived them of any rights. In any event, as the UAE demonstrated in the documentary evidence it provided to the Court in June 2018 and in connection with its responses to Qatar's Communication to the CERD Committee, citizens of Qatar continue to enjoy, without racial discrimination, all of these rights.[105]

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[103] *Id.*, p. 43, para. 41 (Amirfar).

[104] *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. 44. Qatar also asserts that the ownership rights of Qataris have been "impacted" because of the difficulty of obtaining powers of attorney for those Qataris wishing to sell their UAE properties. Again, Qatar cites no measure prohibiting Qataris from obtaining a power of attorney (because there are none) and the UAE has introduced documentary evidence demonstrating that Qataris who do not wish to travel to the UAE are able to obtain powers of attorney through the Embassies of other Gulf States, such as the Kuwaiti embassy in Doha. *See* Exhibits 5 and 6 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 Request for the Indication of Provisional Measures (containing a few examples of the powers of attorney granted by Qatari companies to individuals or law firms in the UAE to manage the Qatari's company's business in the UAE and to represent the company before the UAE courts and any UAE public authority).

[105] *See* Exhibits 3, 5, 6, 8, 9, 11, 12 and 13 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 Request for the Indication of Provisional Measures. *See also The State of Qatar v. United Arab Emirates*, 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, 7 August 2018, paras. 30-63 (**Annex 13**).

51. *Third*, Qatar's allegations of "hate speech" concern acts that have no relevance to Qatar's claims under the CERD. Qatar bases its allegations on UAE legislation from 2012 prohibiting speech in support of Qatar's violations of international law, and on the UAE's decision in May 2017 to block access in the UAE to websites operated by Qatari entities known to be inciting hatred and violence, including *Al Jazeera*.[106] Qatar also complains that the UAE has not suppressed news stories published by media outlets in the UAE that are critical of Qatar.[107] It is not clear how these acts and omissions could possibly relate to Qatar's allegations in relation to the 5 June 2017 Statement. In any event, none of these acts could engage the UAE's obligations under the CERD.[108]

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52. In summary, Qatar cannot hide the obvious truth that after cutting away all of the rhetorical verbiage about "collective expulsions" and "entry bans", it cannot sustain with evidence the 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 basis and credibility of Qatar's case evaporates. Qatar's Application ignores the salient facts described above, which are set out here only in order to provide the true context for the artificial dispute that Qatar now postulates before the Court. The real dispute between Qatar and the UAE does not concern the CERD; it concerns Qatar's repeated and ongoing violations of international law concerning its funding, promotion and support for extremism and terrorism.

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[106] *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, paras. 24-25.

[107] *Id*.

[108] *See* paras. 136-137, *infra*. *See also The State of Qatar v. United Arab Emirates*, 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, 7 August 2018, paras. 35-42 (**Annex 13**).

III. FIRST PRELIMINARY OBJECTION: THE DISPUTE FALLS OUTSIDE OF THE SCOPE *RATIONE MATERIAE* OF THE CERD

53. The CERD is not concerned with discrimination in general, but with *racial* discrimination. "Racial discrimination" is defined in Article 1(1) of the CERD as discrimination on the basis of "race, colour, descent, or national or ethnic origin".

54. Qatar's case is that alleged acts of the UAE that would have applied to Qataris because of their nationality (most specifically, the purported "collective expulsion" and "entry ban") constitute discrimination on the basis of "national . . . origin", therefore coming within the definition of racial discrimination in Article 1(1) of the CERD and thus within the compromissory clause in Article 22 of the CERD. The crucial jurisdictional flaw in Qatar's case is that nationality (as equivalent to citizenship [109]) is not a basis of racial discrimination under the CERD. The term "national . . . origin" in the CERD does not mean or encompass current nationality or citizenship.

55. Since, on Qatar's case, the impugned acts would have been based on nationality, but not on "race, colour, descent, or national or ethnic origin", they do not fall within the scope of the CERD, including its compromissory clause in Article 22. Moreover, Qatar's factual allegations in respect of certain alleged breaches of the CERD concerning interferences with freedom of expression and limitation of media outlets on their face disclose no conduct which is capable of being held to be contrary to the CERD nor of a dispute that falls within the scope of the CERD.

[109] *See, e.g.*, Lassa Oppenheim, *International Law*, (8th ed., Longmans, Green & Co. 1955), p. 645 ("'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."). *See* paras. 66, 76, 94, *infra*.

56. Accordingly, the Court does not have jurisdiction *ratione materiae* over Qatar's Application.

A. THE COURT'S JURISDICTION IS LIMITED TO DISPUTES WITH RESPECT TO THE INTERPRETATION OR APPLICATION OF THE CERD

57. Qatar invokes the Court's jurisdiction solely on the basis of Article 22 of the CERD.[110] Article 22 is specifically limited to any "dispute between two or more States Parties with respect to *the interpretation or application of this Convention . . .*".[111]

58. As the Court has explained:

> When a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and *within the limits set out therein*.[112]

59. The limits placed by the terms of Article 22 of the Convention on the Court's jurisdiction have two important applications in this case.

(a) *First*, the Court could only decide claims concerning the violation of obligations under the CERD. The Court does not have jurisdiction over claims of violations of other human rights instruments or of customary international law. Qatar's allegations that rules of international law other than CERD have been

[110] *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. 10; Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 27 June 2018, at 10:00 a.m. (CR 2018/12), 27 June 2018, p. 20, para. 8 (Donovan).

[111] CERD, Article 22 (emphasis added).

[112] *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*, p. 6, p. 32, para. 65 (emphasis added). *See also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 219, p. 245, para. 71.

breached by the UAE [113] are therefore outside the Court's jurisdiction.

(b) *Second*, the Court could have jurisdiction only if the acts said by Qatar to violate CERD fell within the provisions of the CERD.

60. The Court explained in *Oil Platforms* that when the parties to a case differ on the question of whether a dispute is a dispute about the interpretation or application of a particular treaty:

> the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty . . . pleaded . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.[114]

61. It is the acts of which the applicant State complains that are crucial to this analysis. With reference to this passage from *Oil Platforms*, the Court explained recently in its judgment on preliminary objections in *Certain Iranian Assets* that:

> the Court must ascertain whether the acts of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2, thereof.[115]

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[113] *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, paras. 2, 58, 63 and n. 122.

[114] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 810, para. 16; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment*, 6 June 2018, p. 17, para. 46. *See also Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1148, p. 1159, para. 47; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 124, p. 137, para. 38.

[115] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections*, Judgment of 13 February 2019, p. 17, para. 36.

62. Whether the dispute now before the Court is one concerning the interpretation or application of the CERD is a question that must be assessed against the content of Qatar's Application and as at the date of the Application. As stated by the Court:

> In numerous cases, the Court has reiterated the general rule which it applies in this regard, namely: 'the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings'. . . . It is easy to see why this rule exists. . . . [I]t must be emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted. If this is not done and regardless of whether these conditions later come to be fulfilled, the Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings.[116]

B. THE ACTS QATAR COMPLAINS OF DIFFERENTIATE BETWEEN INDIVIDUALS ON THE BASIS OF CURRENT NATIONALITY AND DO NOT FALL WITHIN THE CERD

63. In its Application, as well as in its oral pleadings before the Court in connection with its Request for Provisional Measures, Qatar repeatedly describes the UAE's measures as measures which discriminate against Qataris on the basis of their "national origin."[117] This attempt to bring its claims within the provisions of the CERD is undermined by the descriptions of those who Qatar alleges have been "targeted" by or are the subject of such measures, who are exclusively citizens of Qatar, *i.e.*, persons having Qatari nationality.

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[116] *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. 412, p. 438, paras. 79-80.

[117] *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, paras. 3, 34, 44, 54, 58, 59, 62, 63, 65.

64. Qatar in fact alleges acts which, even if proven, would establish differentiation on the basis of current nationality. As explained in Section C below, the CERD, as a convention to stamp out *racial* discrimination, does not prohibit differentiation on the basis of current nationality.

65. That Qatar's complaints are, in essence, about the alleged different treatment of Qataris *qua* citizens of Qatar is apparent from its Application and from its oral pleadings for provisional measures:

- Qatar states in its Application that "the mass expulsion of Qataris from the UAE and the total ban on entry of Qataris into the UAE are deliberate violations of the prohibition on racial discrimination against *non-citizens* under the CERD."[118]

- The Agent of Qatar stated at the hearing on Qatar's Request for Provisional Measures that "the UAE has enacted a series of broad, discriminatory measures against my country and its people *on the basis of their Qatari nationality*."[119]

- Counsel for Qatar at the same hearing stated that "[o]n 5 June 2017, the UAE and other States enacted a series of discriminatory measures targeting Qataris *on the basis of their nationality*."[120]

66. Even acts which Qatar in its Application describes as discrimination on the basis of "national origin" are, properly speaking, acts which differentiate between citizens of Qatar and citizens of other States. Thus the measures announced on 5 June 2017 (supposedly "based expressly on their

[118] *Id.*, para. 59 (emphasis added).

[119] *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) (emphasis added).

[120] *Id.*, p. 22, para. 16 (Donovan) (emphasis added).

national origin"[121]) would only apply to citizens of Qatar on the basis of their nationality in the sense of citizenship, that is, because of an individual's legal bond to the State of Qatar.[122]

67. Not only in these proceedings, but in other statements also, it is clear that the crux of Qatar's complaint is that the UAE has treated Qataris differently because of their nationality:

- Qatar has claimed before the CERD Committee that the UAE "unlawfully targeted Qatari citizens *solely on the basis of their nationality*."[123]

- Qatar claimed in a letter to the UAE, dated 25 April 2018, relied upon by Qatar in its Application, that the UAE "enacted and implemented discriminatory statutes and policies directed at Qatari citizens and companies *on the sole basis of their nationality*" and that the UAE's actions "unlawfully and without precedent target Qatari nationals and not others *on the basis of their nationality*".[124]

68. It is therefore clear that Qatar's complaint is that the UAE treats Qataris differently because they are citizens of Qatar. In other words, the

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[121] *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.

[122] *See*, *e.g.*, Lassa Oppenheim, *International Law*, (8th ed., Longmans, Green & Co. 1955), p. 645 ("'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."). *See* paras. 76, 94, *infra*. For instance, "expel[ing]" Qataris from the UAE or "prohibit[ing]" their entry into the UAE could only be effected on the basis of their being citizens of Qatar. *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.

[123] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March2018, para. 58 (emphasis added) (**Annex 12**).

[124] *See 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, Annex 21, pp. 3-4 (emphasis added).

differentiation is on the basis of current nationality. This does not, however, fall under "national origin" and the definition of racial discrimination in Article 1(1) of the CERD, for the reasons stated in Section C below.

69. Accordingly the Court does not have jurisdiction to hear the complaints of Qatar made pursuant to Article 22 of the CERD.

C. THE CERD DOES NOT PROHIBIT DIFFERENTIATED TREATMENT BASED ON CURRENT NATIONALITY

70. 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 their object and purpose.[125] Reading the CERD in light of these rules, the CERD cannot apply to the acts which form the basis of Qatar's claims, namely, different treatment on the basis of current nationality.

71. 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 exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (emphasis added)[126]

72. The ordinary meaning of "national . . . origin", read in good faith 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*

[125] 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).

[126] International Convention on the Elimination of All Forms of Racial Discrimination, entered into force on 4 January 1969 ("**CERD**"), Article 1(1) (emphasis added).

préparatoires of the CERD. The CERD does not prohibit the alleged discrimination of individuals of which Qatar complains, since such differentiation is based on current nationality.

1. The Ordinary Meaning of "National Origin" Does Not Encompass Current Nationality

73. 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".[127]

74. The dictionary definition of "origin" is "a person's social background or ancestry",[128] even "the country from which [a] person comes".[129] The Chinese, English, French, Russian and Spanish texts of the Convention are all equally authentic.[130] The French term "*origine*" is defined as: "*Point de départ de quelque chose; source, provenance*" or "[*f*]*amille, milieu social, ascendance, extraction*".[131] The equivalent term used in each of the other authentic languages of the CERD has a similar meaning.[132]

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[127] *Yearbook of the International Law Commission* (1966), vol. II, p. 220.

[128] Definition of "origin" in *Oxford Dictionaries*, available at: https://en.oxforddictionaries.com/definition/origin.

[129] Definition of "origin" in *Cambridge Dictionar*y, available at: https://dictionary.cambridge.org/us/dictionary/english/origin.

[130] CERD, Article 25(1).

[131] Dictionnaire de l'Académie française, 9th edn., available at: http://www.dictionnaire-academie.fr/entry/A9O0740.

[132] Real Academia Española, Diccionario de la lengua española, "*origen*", available at: http://dle.rae.es/?id=RD4RJlJ (Spanish); ГРАМОТА, "происхождение", available at: http://gramota.ru/ (Russian). The Chinese text uses the term "民族" instead of "national *origin*". As noted in paragraph 81 *infra*, "民族" means "nation" or "ethnic group".

75. "National" is used as the 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 territorial limits of a state."[133] When taken with "origin", the second sense of "nation" is the most appropriate. Likewise in French, "*nation*" can mean a "[*c*]*ommunauté dont les membres sont unis par le sentiment d'une même origine, d'une même appartenance, d'une même destinée*".[134] The same is true of the other authentic language versions of the CERD.[135]

76. "National origin", then, in its ordinary meaning, cannot be equated to nationality.[136] Whereas nationality in the sense of citizenship is a legal relationship between an individual and a State,[137] "national origin" denotes an

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[133] *The Chambers Dictionary*, definition of "nation," available at: https://chambers.co.uk (emphasis added).

[134] Dictionnaire de l'Académie française, 9th edn, available at: http://www.dictionnaire-academie.fr/entry/A9N0108.

[135] Real Academia Española, Diccionario de la lengua española, "*nación*", available at: http://dle.rae.es/?id=QBmDD68 (Spanish); ГРАМОТА, "нация", available at: http://gramota.ru/ (Russian); and Online Edition, Xinhua Dictionary, "民族", available at: http://xh.5156edu.com/html5/z37m63j328142.html (Chinese).

[136] *See, e.g.*, *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)").

[137] 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

association with a nation of people, not a State. That nation may or may not be a State in its own right under international law.[138] An individual can acquire a nationality from a State or he can lose it; he can even hold more than one nationality at once. But one's national 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 that person's national origin, it is just that: a coincidence.[139] Thus, national origin and nationality are distinct concepts. The ordinary meaning of the words "national origin" does not equate with an individual's nationality.

2. Taken in Context, "National Origin" Cannot Encompass Current Nationality

77. The ordinary meaning of a treaty term "is not to be determined in the abstract but in the context of the treaty".[140] The immediate "context" includes the remaining terms of the provision, the entire article, the preamble of the treaty and any annexes.[141]

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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). *See also*, Lassa Oppenheim, *International Law* (8th ed., Longmans, Green & Co. 1955), p. 645 ("'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.").

[138] For example, 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. There is no such thing, however, as a Zulu, Aymaran or Inuit State.

[139] 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.

[140] *Yearbook of the International Law Commission* (1966), vol. II, p. 221.

[141] 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).

78. 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 a legal bond that can change over time. The context of Article 1 thus precludes "national origin" from meaning or encompassing "nationality" in the sense of citizenship.

79. Furthermore, if it did mean "nationality" in the sense that Qatar asserts, the drafters could easily have used that word. Elsewhere in the CERD, and in the same Article even, "nationality" is used.[142] That the drafters did not use the term "nationality" in Article 1(1) thus confirms 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).

80. Other provisions of the CERD confirm that "national. . .origin" in the CERD indicates only immutable qualities. Article 1(2), which forms part of the immediate context of "national. . .origin" in 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

[142] CERD, Article 1(3).

concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."[143]

81. Of the five authentic texts of the Convention, the Chinese text makes particularly clear the distinction between the term "national origin", as used in Article 1(1), and "nationality", as used in Article 1(3). The term used in Article 1(1) is "民族" which means "ethnic group" or "nation" in the sense of a people united by common descent, history, culture or language. In contrast, the relevant terms used in Article 1(3) are "国籍" and "籍民", which rendered in English would be "nationality" and "nationals", respectively. The French and Spanish versions also use different terms with different meanings in Article 1(1) as compared to Article 1(3). The French refers to "*l'ascendance ou l'origine nationale ou ethnique*" in Article 1(1), as opposed to "*la nationalité*" in Article 1(3). Equally, the Spanish refers in Article 1(1) to "*linaje u origen nacional o étnico*", whereas in Article 1(3) the word used is "*nacionalidad*". The Russian version is also clear that the term used in Article 1(1) does not mean or include nationality. It uses "*национального* [. . .] *происхождения*" in Article 1(1), and in Article 1(3) uses "*национальной принадлежности*" and "*национальности*". The intended meaning of the Russian version of Article 1(1) is confirmed by the consistent interventions made by the Soviet Union recorded in the *travaux préparatoires*, discussed below.[144]

82. Article 5 also confirms this conclusion, namely, that nationality does not fall within the scope of "national origin" as a prohibited ground of discrimination in Article 1(1). Article 5 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

[143] *Id.*

[144] *See* para. 109, *infra.*

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 citizens of certain States the right to vote or the right to be a public servant would be obliged to confer such rights on citizens of *all* States. This cannot be the meaning of the CERD, and would moreover be inconsistent with State practice.[145]

83. 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 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 citizens and non-citizens, as elaborated below.[146] 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" in the sense of citizenship.

3. The Object and Purpose of the CERD Confirms That "National Origin" Does Not Encompass Current Nationality

84. The object and purpose of the CERD confirms that "national origin" does not cover current nationality in the sense of citizenship as a prohibited ground of discrimination. In the absence of a clause specifically stating the purpose of a treaty, the title of that treaty may provide helpful guidance.[147] Similarly, "the preamble of a treaty is regularly a place where the parties list the purposes they want to pursue through their agreement."[148] As the name of the

[145] *See* para. 121, *infra.*

[146] *See* paras. 122-129, *infra*.

[147] Oliver Dörr & Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer Science & Business Media 2011), p. 546.

[148] *Id*.

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*.[149]

85. Other parts of the Preamble reiterate the overall aim of putting an end to racial discrimination with no indication of any intention to prohibit discrimination on the basis of present nationality.[150] The substantive provisions also reveal that overarching object and purpose of the Convention.[151]

86. 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

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[149] CERD, Preamble (emphasis added).

[150] 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).

[151] *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").

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 different treatment on the basis of present nationality.

4. The Requirement to Interpret the CERD in Good Faith Confirms that "National Origin" Does Not Encompass Current Nationality

87. Treaty interpretation must be conducted in "good faith". Good faith "strongly implies" an element of reasonableness.[152] It also has an intimate connection with the principle of effectiveness, which itself has two closely related meanings. In its narrow meaning, it requires an interpretation that gives a term its full effect. In its broader meaning, it requires interpretation of the terms of a treaty in light of that treaty's object and purpose.[153]

88. Qatar's interpretation of Article 1(1) certainly does not meet the "reasonableness" test. For example, as previously noted, under Qatar's interpretation of "national origin", if a State conferred on citizens of certain States the right to vote or the right to be a public servant, then the State would be obliged to confer such rights on citizens of all States. This cannot be the meaning of the CERD.

89. Further, as explained in the previous section, Qatar's interpretation of Article 1(1) is also inconsistent with the CERD's object and purpose.

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[152] *See* R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed., Longman, 1992), vol. I, p. 1272, n. 7; *Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgement of May 26th, 1959: I.C.J. Reports 1959*, p. 127 (Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender), p. 189.

[153] *See Yearbook of the International Law Commission* (1966), vol. II, p. 219.

90. In sum, Qatar's interpretation is contrary to each of the four constituent elements of the "general rule of interpretation" of treaties codified in Article 31 of the VCLT.

5. The Ordinary Meaning of "National Origin" Is Confirmed by the Circumstances of the CERD's Conclusion

91. When the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the "**Sub-Commission**") began its work on the CERD, the principal reference point for the definition of "racial discrimination" was the Universal Declaration of Human Rights (the "**UDHR**"). Article 2 of the UDHR states:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

92. The *travaux préparatoires* to the UDHR confirm the ordinary meaning of the words "national . . . origin." The Sub-Commission in its first report on the UDHR to the Commission added a note on Article 2: "the words 'national origin' should be interpreted by taking the idea of 'nationality' not in its legal sense (subject of a State), but in its sociological sense (national characteristics)."[154] The note was amended to read: "the words 'national origin' should be interpreted by taking this conception, not in the sense of citizen of a State, but in the sense of national characteristics."[155] The drafters of the CERD

[154] *Report of the First Session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 5 December 1947, doc. E/CN.4/Sub.2/38, p. 3 (**Annex 22**).

[155] *Report of the First Session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 6 December 1947, doc. E/CN.4/52, p. 5 (**Annex 23**).

used "national origin" expressly because the UDHR had used the phrase.[156] It therefore ought to have the same meaning in both instruments.

93. "National origin" and "national extraction" are in two other international treaties which preceded the CERD: the International Labour Organization Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (the "**ILO Convention**")[157] and the UNESCO Convention against Discrimination in Education (the "**UNESCO Convention**").[158] The ILO Convention initially contained the terms "national origin." This was amended to "national extraction" which, the delegates felt, covered the same ground as "national origin" but also removed any lingering doubt that discrimination on the basis of nationality was permitted.[159] The UNESCO Convention used "national origin" to follow the example of the UDHR. Thus all three international instruments, which preceded the CERD and which contemplated discrimination and "national origin", did not prohibit different treatment on the basis of nationality.

[156] *See Third Committee, 1307th meeting*, 18 October 1965, p. 95 (**Annex 41**). *See also Sub-Commission on Prevention of Discrimination and Protection of Minorities, 410th meeting*, 7 February 1964, doc. E/CN.4/Sub.2/SR.410, p. 9 (**Annex 24**); *Commission on Human Rights, 809th meeting*, 14 May 1964, doc. E/CN.4/SR.809, p. 4 (**Annex 33**).

[157] Convention (No. 111) Concerning Discrimination in respect of Employment and Occupation, concluded on 25 June 1958, entered into force 15 June 1960, 362 United Nations Treaty Series 32.

[158] Convention against Discrimination in Education, concluded on 15 December 1960, entered into force 22 May 1962, 429 United Nations Treaty Series 94.

[159] International Labour Conference, Report VII(2) 40th session, Discrimination in the Field of Employment and Occupation, June 1957, p. 105, available at: https://www.ilo.org/public/libdoc/ilo/1957/57B09_64_engl.pdf.

94. The above instruments present a settled meaning of "national origin" at the time of drafting the CERD which did not encompass nationality. That meaning stands in stark contrast to the equally settled meaning of "nationality", *i.e.*, as equivalent to "citizenship". The 1955 edition of *Oppenheim's International Law*, current at the time of the drafting, 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.[160]

95. At the time of drafting the CERD, States already treated citizens of some foreign States more favourably than others, a practice which they continue to this day and which would not be consistent with interpreting "national origin" as encompassing current nationality. For example, Denmark, Norway and Sweden had agreed that their citizens would have reciprocal rights of nationality — rights which were not afforded to citizens of other States.[161] The founding European Economic Community Member States granted favourable rights to each other's citizens.[162] Spain had agreed with each of Argentina,[163] Colombia,[164]

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[160] Lassa Oppenheim, *International Law* (8th ed., Longmans, Green & Co. 1955), p. 645 (emphasis added).

[161] Agreement between Denmark, Norway, and Sweden on the Implementation of the Provisions of Section 10 of the Danish Nationality Act No. 252 of 27 May 1950, in Section 10 of the Norwegian Nationality Act of 8 December 1950, and in Section 10 of the Swedish Nationality Act (No. 382) of 22 June 1950, concluded 21 December 1950, entered into force 1 January 1951, 90 United Nations Treaty Series 3 (1951).

[162] Treaty establishing the European Economic Community, Rome, concluded 25 March 1957, entered into force 1 January 1958, 3 United Nations Treaty Series 294 (1958), Articles 48, 37, 59, 52.

France,[165] Germany,[166] and Switzerland[167] that it would not require visas from citizens of those States. Paraguay exempted Japanese citizens from customs duties, taxes, and charges on imports associated with their immigration to Paraguay from Japan.[168] Bilateral investment treaties in general conferred rights on the citizens of one State, who invested in the other State, rights which citizens of other States could not enjoy. At least thirty-five States had concluded bilateral investment treaties before the CERD.[169]

96. At the time of the CERD's drafting and conclusion, then, "national origin" did not mean current nationality. Other instruments of the time did not use the phrase in that way; and it was accepted (as it still is) that States may differentiate as between citizens of different States.

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[163] Exchange of notes constituting an Agreement between Spain and Argentina concerning the abolition of visas, concluded 8 July 1960, entered into force 9 July 1960, 1256 United Nations Treaty Series 81 (1990).

[164] Exchange of notes constituting an Agreement between Spain and Colombia relating to the abolition of visas, concluded 26 May 1961, entered into force 1 July 1961, 1258 United Nations Treaty Series 335 (1991).

[165] Exchange of notes constituting an Agreement between Spain and France relating to the abolition of visas for citizens of both countries, concluded 13 April 1959, entered into force 15 April 1959, 1150 United Nations Treaty Series 415 (1988).

[166] Exchange of notes constituting an Agreement between Spain and Germany relating to the abolition of visas for citizens of both countries, concluded 5 May 1959, entered into force 8 May 1959, 1151 United Nations Treaty Series 17 (1989).

[167] Exchange of notes constituting an Agreement between Spain and Switzerland relating to the abolition of visas for citizens of both countries, concluded 14 April 1959, entered into force 24 April 1959, 1151 United Nations Treaty Series 3 (1989).

[168] Agreement between Japan and Paraguay concerning Immigration, concluded 22 July 1959, 373 United Nations Treaty Series 85 (1960), Article V.

[169] Pakistan, Germany, Belgium, Cameroon, Central African Republic, Chad, Congo, Costa Rica, Cote d'Ivoire, Ecuador, Ethiopia, France, Guinea, Iran, Kuwait, Liberia, Luxembourg, Madagascar, Malta, Morocco, the Netherlands, Niger, Republic of Korea, Rwanda, Senegal, Sierra Leone, Sri Lanka, Sudan, Sweden, Switzerland, Tanzania, Thailand, Togo, Tunisia and Turkey. *See* United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999*, UNCTAD/ITE/IIA/2, available at: https://unctad.org/en/Docs/poiteiiad2.en.pdf, pp. 25-122.

6. The Ordinary Meaning of "National Origin" Is Confirmed by the Travaux Préparatoires

97. The *travaux préparatoires* of the CERD confirm the interpretation which was 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 current nationality.[170] The drafters of the Convention had in mind two distinct concepts.[171]

98. The drafting of the CERD took place in three stages: in the Sub-Commission, then 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.[172] At all three stages of drafting, the delegates were aware of the distinction between "national origin" and "nationality" in the sense of citizenship and were keen to avoid any overlap between the two terms.

99. 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 current nationality. Subsequent practice of States Parties to the CERD confirms that it cannot be otherwise.[173]

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[170] 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.

[171] *See, e.g.*, *Sub-Commission on Prevention of Discrimination and Protection of Minorities, 411th meeting*, 5 February 1964, doc. E/CN.4/Sub.2/SR.411, p. 10 (**Annex 28**). *See* para.105, *infra*.

[172] 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.

[173] *See* paras. 116-126, *infra*.

(a) The Travaux *within the Sub-Commission on Prevention of Discrimination and Protection of Minorities*

100. 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".[174]

101. The Sub-Commission never intended "national origin" to mean nationality. In early discussions the Chairman suggested that the Convention should use the phrase "national origin" because it appeared in the UDHR.[175] In the UDHR, as is clear from its own *travaux préparatoires*, the phrase "national origin" did not encompass present nationality;[176] and thus nor should it in the CERD.

102. This is made clear in the debates within the Sub-Commission whether 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

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[174] *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") (**Annex 25**); *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) ("[n]o 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.") (**Annex 26**). 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, Article 1 (**Annex 27).**

[175] *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, *410th Meeting*, 15 January 1964, doc. E/CN.4/Sub.2/SR.410, p. 9 (**Annex 24**).

[176] *See* para. 92, *supra*.

"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.[177] This view was expressed by the member from 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 frequently used to mean "citizenship"*. . . .the use of the term "national origin" would avoid ambiguity.[178]

103. Accordingly, the Sub-Commission did not consider it necessary to adopt an amendment proposed by Mr Krishnaswami, the member 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.[179]

104. The member from India went on to explain that "[w]ith that explanatory foot-note, the article could not be interpreted as denying to a State its right to make special provisions regarding aliens within its territory."[180] The rejection of the inclusion of this amendment and the explanation of the

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[177] A minority of members opposed the use of "national origin" since they were concerned 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*, 5 February 1964, doc. E/CN.4/Sub.2/SR.411, pp. 5-6 (**Annex 28**).

[178] *Id.*, pp. 6, 12 (emphasis added).

[179] *Id.*, p. 4.

[180] *Id.*, p. 4.

Sub-Commission's members for doing so shows that in order to avoid using "nationality" in a special sense, the term "national origin" was preferable.[181]

105. This tension between a special meaning of "nationality" on the one hand and "national origin" on the other continued in the discussions in the Sub-Commission. In fact, the draft text of Article 1 eventually adopted unanimously by the Sub-Commission and submitted 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)".[182] 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.[183] The Chairman of the Sub-Commission explained that this interpretive article was intended to indicate that the draft

[181] Mr Cuevas Cancino, the member 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*, 5 February 1964, doc. E/CN.4/Sub.2/SR.411, pp. 9-10 (**Annex 28**). 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 of putting that word in quotation marks or using a foot-note. 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.

[182] *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 (**Annex 29**); *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 (**Annex 30**).

[183] "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 (**Annex 30**) (emphasis added).

convention "did not change the *status quo ante* with respect to the political rights of non-nationals".[184] The member from 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 I which that term was not intended to mean."[185] The member from Sudan, Mr Mudawi, agreed, adding that the object of Article 8 was to prevent a misinterpretation between "national origin" and "nationality" and clarifying that "nationality" did not refer to an individual's legal relationship to a State.[186]

106. 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 on Human Rights*

107. Discussions in the Commission on Human Rights 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. It did not take long for that position to become clear.[187] The Commission used "national origin" in

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[184] *See Sub-Commission on Prevention of Discrimination and Protection of Minorities, 427th meeting*, 12 February 1964 1964, doc. E/CN.4/Sub.2/SR.427, p. 5 (**Annex 31**).

[185] *See id.*, p. 5.

[186] *Id.*, p. 3 ("[T]he object of [Draft Article 8] was to remove the difficulty arising from the use of the terms 'nationality' and 'national origin' in article I, as adopted (E/CN.4/Sub.2/L.322). The term '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.") (**Annex 31**).

[187] Looking at the preamble, Lebanon proposed adding the words "in particular as to . . . national origin" to paragraph 2 (which referred to the UDHR's prohibition on discrimination). 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, para. 32 (**Annex 38**). The member from the United Kingdom replied that if "national origin" was synonymous with "nationality", then "it would be difficult to accept the addition proposed by Lebanon for it was quite normal for a State to differentiate between its subjects and foreign nationals". If the expression, however, referred to "the different origins of the citizens of a country, some being of alien stock or having acquired their nationality by naturalisation, it was indeed

the preamble in the socio-cultural sense, a sense which would place the current nationality-based claims of Qatar beyond the reach of the CERD. The Commission proceeded to consider the meaning of "national origin" in Article 1(1) at its 809th meeting. Whilst some members were concerned that "national origin" could be construed to mean present nationality, that is not to say that the Commission actually intended that meaning. On the contrary, members at that meeting desired the Convention to exclude current nationality as a basis of racial discrimination.[188]

108. The debate in the Commission over the risk of misinterpretation of "national origin" surfaced after the Commission decided to delete the text included in parenthesis in Article 1 of the Sub-Commission's draft[189] (which read "in the case of States composed of different nationalities discrimination based on such difference"[190]) and to delete draft Article 8 of the Sub-Commission's draft, which had been designed to indicate that "national origin" was not the same as

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true", the member explained, "that discrimination might be met within certain countries." After the Philippines agreed, and after Lebanon and the other member raised no objections, the Commission adopted the Lebanese amendment unanimously. *See Commission on Human Rights, 781st meeting*, 3 April 1964, doc. E/CN.4/SR.781, pp. 10-11 (**Annex 32**).

[188] For example, the member 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*, 14 May 1964, doc. E/CN.4/SR.809, p. 4 (**Annex 33**). The member 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 member 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.").

[189] *Commission on Human Rights, 786th meeting*, 21 April 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) (**Annex 34**). *See* para. 105, *supra*.

[190] *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 (**Annex 30**).

"nationality".[191] Members agreed to retain "national origin" in Article 1 because it was clear from Article 8 that it could not encompass present nationality.[192] Without Article 8, however, to qualify the term, the member from France believed the draft convention was no longer acceptable and so proposed deleting the word "national" before "or ethnic origin."[193] He believed it was "unnecessary to refer to *nationality* in a convention on the elimination of *racial* discrimination."[194]

109. The responses of the members from the USSR and India are both revealing. In spite of the USSR member's grave discomfort with "national origin", he felt that to delete the word "national" in the Russian text "would mean that discrimination was tolerated when the victim belonged to a different national group."[195] It is telling that he was concerned for victims of different "national groups" — *not* different nationalities or citizenships. More explicitly, the member 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."[196] The nationality, in a strict legal sense, of victims was irrelevant.

110. The meeting which followed reflects this conclusion. The Danish member 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-

[191] *Commission on Human Rights*, *808th meeting*, 14 May 1964, doc. E/CN.4/SR.808, p. 17 (indicating that article 8 was deleted by 12 votes to 2, with 7 abstentions) (**Annex 35**).

[192] *See, e.g.*, the member from Canada who "considered it necessary" to retain "national origin" because when read in conjunction with Article 8 it "clearly referred, not to nationality, but to country of origin." *Commission on Human Rights*, *784th meeting*, 21 April 1964, doc. E/CN.4/SR.784, p. 10 (**Annex 36**).

[193] *Commission on Human Rights*, *809th meeting*, 14 May 1964, doc. E/CN.4/SR.809, pp. 4, 6, 7 (**Annex 33**).

[194] *Id.*, p. 8 (emphasis added).

[195] *Id.*, p. 7.

[196] *Id.*, p. 8 (emphasis added).

Commission to be added at the end of the definition of racial discrimination, also in square brackets.[197] 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 field. [*In this paragraph the expression "national origin" does not cover the status of any person as a citizen of a given State*.][198]

111. The Commission adopted this wording unanimously[199] and this was the text that was taken to the Third Committee of the General Assembly,[200] including the phrase in square brackets that indicated that "national origin" did not cover "nationality" in the sense of citizenship.

(c) The Travaux *within the Third Committee of the General Assembly*

112. The Third Committee, no less than the Commission, was keen to avoid "national origin" meaning both a person's legal status as a citizen of a State and that person's socio-cultural associations with a nation of people. To avoid that double meaning, the delegate of France, with the United States, suggested an amendment which excluded the former, legal sense – the sense on which Qatar's claims in its Application rest. The amendment suggested read:

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[197] *Commission on Human Rights, 810th meeting*, 15 May 1964, doc. E/CN.4/SR.810, p. 5 (**Annex 37**).

[198] *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) (**Annex 38**).

[199] *Commission on Human Rights, 810th meeting*, 15 May 1964, doc. E/CN.4/SR.810, p. 6 (**Annex 37**).

[200] *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 (**Annex 38**).

> 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.[201]

113. Other delegates, whilst recognising the potential ambiguity of "national origin", also intended the phrase to exclude current nationality. These include the following:

- 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 as a nation in the *social and cultural senses* even though it had no government of its own. The members of such a nation within a *State* might be discriminated against, not as members of a particular race or as individuals, but as members of a nation which existed in its former political form."[202]

- 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: "[f]or 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."[203]

- 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

[201] *Report of the Third Committee – Draft International Convention on the Elimination of All Forms of Racial Discrimination*, 18 December 1965, doc. A/6181, para. 32 (**Annex 39**).

[202] *Third Committee*, *1304th meeting*, 14 October 1965, doc. A/C.3/SR.1304, para. 5 (emphasis added) (**Annex 40)**.

[203] *Id.*, para. 13.

discrimination, as well as foreign minorities within a State which might also be subjected to persecution."[204]

- 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."[205] 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 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".[206]

114. Admittedly, the U.S. and France withdrew their amendment which clarified in specific terms that current nationality was not a basis of discrimination prohibited by the Convention.[207] However, they did so in favour of a compromise amendment proposed by nine States which ultimately became the provisions of

[204] *Id.*, para. 16 (emphasis added).

[205] *Id.*, para. 21 (emphasis added).

[206] *Id.*, para. 23.

[207] *Report of the Third Committee – Draft International Convention on the Elimination of All Forms of Racial Discrimination*, 18 December 1965, doc. A/6181, para. 32 (**Annex 39**), 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. 112.

Article 1 of the CERD.[208] 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".[209] Given the views they had expressed in proposing their amendment, France and the United States of America would only have so proceeded if it was without doubt that "national origin" did not include current nationality in the sense of citizenship.[210]

115. Therefore, this fairly detailed description of the *travaux préparatoires* at the various stages of drafting confirms 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 current "nationality". The drafters of the CERD, as is clear from the above, were at pains to avoid the misinterpretation of "national origin" on which Qatar now relies.

[208] 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*, 18 December 1965, doc. A/6181, para. 37 (**Annex 39**).

[209] *Third Committee, 1307th meeting*, 18 October 1965, doc. A/C.3/SR.1307, para. 8 (emphasis added) (**Annex 41**).

[210] *See, e.g., 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 ("The *travaux 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 (United Nations, doc. A/6181, pp. 12-13).").

7. Subsequent Practice of States Parties to the CERD Confirms that Differentiation Based on Nationality or Citizenship Does Not Constitute "Racial Discrimination"

116. Subsequent practice of States Parties to the CERD confirms that differentiation based on nationality or citizenship, even in the exercise of several of the rights recognized in the CERD, does not constitute "racial discrimination" prohibited by the CERD. In accordance with Article 31(3)(b) of the VCLT, "[a]ny 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.[211] 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*.[212]

117. States Parties to the CERD around the world from all legal traditions often favour citizens of one State over citizens of another and have enacted legislation treating citizens of different foreign States differently 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.

118. As outlined below, and purely by way of example, States Parties to the CERD do not grant equal enjoyment of rights listed in Article 5 of the CERD; and they differentiate (without objection from other Parties) on the very grounds

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[211] 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).

[212] Oliver Dörr & Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer Science & Business Media 2011), p. 557 (emphasis added).

which Qatar now complains of, that is, on the grounds of current nationality. Qatar's Application thus rests on a strained interpretation of "national origin" which the accepted practice of States Parties cannot permit.

(a) Freedom of Movement, Article 5(d)(i)

119. Australia requires citizens of other States to obtain a visa to enter Australia — apart from citizens of New Zealand who may enter without one.[213] Barbados similarly allows citizens of certain States to enter without a visa,[214] as do Bolivia,[215] China,[216] Colombia,[217] Cyprus,[218] Ecuador,[219] Guyana,[220] India,[221]

[213] Migration Act (Cth), s. 42 (**Annex 103**).

[214] Ministry of Foreign Affairs and Foreign Trade of Barbados, "Visas required by Barbadians for other countries", available at: https://www.foreign.gov.bb/documents/foreign-policy/47-visasrequiredbybarbadiansforothercountries/file (**Annex 104**).

[215] Supreme Decree No 1923, 13 March 2014, Article 8, available at: http://www.acnur.org/fileadmin/Documentos/BDL/2014/9563.pdf (**Annex 105**). *See also* Newsletter of the National Migration Direction, Requirements to enter Bolivia, undated, available at: http://www.migracion.gob.bo/upload/emergente.pdf (in Spanish) (**Annex 106**).

[216] List of Agreements on Mutual Visa Exemption Between the People's Republic of China and Foreign Countries (as of 24 December 2018), available at: http://govt.chinadaily.com.cn/a/201712/08/WS5b784aea498e855160e8d1f5.html (**Annex 107**).

[217] Resolution 10535 of 2018, Ministry of Foreign Affairs, 14 December 2018, Articles 1 to 5, available at: http://www.cancilleria.gov.co/sites/default/files/FOTOS2018/resolucion_10535_del_14_de_diciembre_de_2018.pdf (in Spanish) (**Annex 108**).

[218] Cyprus Ministry of Foreign Affairs, Visa Policy, available at: http://www.mfa.gov.cy/mfa/mfa2016.nsf/All/0E03E0EE9B9833EAC2258022003F023B?OpenDocument (**Annex 109**).

[219] Ministerial Agreement No. 000031, Ministry of Foreign Affairs and Human Mobility, 2 April 2014, Article 1, available at: http://www.trabajo.gob.ec/wp-content/uploads/2015/03/ACUERDO-MERCOSUR.pdf (**Annex 110)**.

[220] Immigration Act, s. 5 (**Annex 111**); Immigration (Passports) Order clauses 2-3 and Schedule (**Annex 122**). *See also* Ministry of Foreign Affairs, Visa Entry Requirements (Countries), available at: http://www.minfor.gov.gy/visa-entry-requirements-countries/ (**Annex 113**).

[221] Ministry of External Affairs of the Government of the Republic of India, List of Countries/Territories with which Bilateral Agreements on Exemption from Requirement of Visa by Diplomatic, Official/Service and Ordinary Passport Holders are Signed/Currently in Force, available at: http://mea.gov.in/bvwa.htm (**Annex 114**).

Ireland, [222] Jamaica, [223] Jordan, [224] Mali, [225] Mexico, [226] Morocco, [227] New Zealand, [228] Nigeria, [229] South Africa, [230] Thailand, [231] Turkey, [232] Uganda, [233] the

[222] Immigration Act 2004, s. 17 (**Annex 115**); Immigration Act 2004 (Visas) Order 2014, paras. 3 and 4 and Schedules 1 to 5 (**Annex 116**).

[223] Passport Immigration and Citizenship Agency of Jamaica, "Requirements for travel to Jamaica", available at: http://www.pica.gov.jm/immigration/general-immigration-information/requirements-for-travel-to-jamaica/ (**Annex 117**).

[224] Honorary Consulate of Jordan in Ireland, available at: http://jordancons.web.ie/visa-eligibility/ (**Annex 118**).

[225] Ministère des Affaires Etrangères, de la Coopération Internationale et de l'Intégration Africaine, Venir au Mali, available at: http://www.diplomatie.ml/?page_id=5522 (**Annex 119**).

[226] *See, e.g.*, Mexican Government information website on visas, 7 January 2014, available at: http://www.sectur.gob.mx/guia-de-viaje/visa/ (**Annex 120**); Agreement by which visa requirements are waived with regard to passports of nationals of Ecuador, 27 November 2018, Article 1, available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5545102&fecha=29/11/2018 (**Annex 121**).

[227] Loi n° 02-03 relative à l'entrée et au séjour des étrangers au Royaume du Maroc, à l'émigration et l'immigration irrégulières, Article 3 (**Annex 122**). For a list of States whose nationals do not need visas to enter Morocco see: Consulate General of the Kingdom of Morocco in London, "Visa", available at: http://www.moroccanconsulate.org.uk/en/Visa.html (**Annex 123**).

[228] Immigration Act 2009, s. 69 (**Annex 124**); Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010, Schedule 2 (**Annex 125**).

[229] Nigerian Immigration Service, Visa on Arrival, available at: https://immigration.gov.ng/visa-on-arrival/ (**Annex 126**).

[230] Immigration Act 13 of 2002, ss. 9-10 (**Annex 127**); South African Government, Department of Home Affairs, Passport holders who are exempt from visas for South Africa, available at: http://www.home-affairs.gov.za/index.php/countries-exempt-from-sa-visas (**Annex 128**).

[231] Ministry of Foreign Affairs of the Kingdom of Thailand, Summary of Countries and Territories entitled for Visa Exemption and Visa on Arrival to Thailand, available at: http://www.consular.go.th/ main/contents/filemanager/VISA/Visa%20on%20Arrival/VOA.pdf (**Annex 129**).

[232] Law on Foreigners and International Protection (Yabancılar ve Uluslararası Koruma Kanunu), No. 6458, Article 12 (**Annex 130**). A full list of exempt countries is published on the Republic of Turkey, Ministry of Foreign Affairs website, available at: http://www.mfa.gov.tr/visa-information-for-foreigners.en.mfa.

[233] Nationals from Angola, Eritrea, Malawi, Madagascar, Seychelles, Swaziland, Zambia, Comoros, Kenya, Mauritius, Zimbabwe, Tanzania, Rwanda, Burundi, Antigua, Barbados, Fiji, Grenada, Lesotho, Sierra Leone, Solomon Islands, The Grenadines, Vanuatu, Ghana, Cyprus, Bahamas, Belize, Gambia, Jamaica, Malta, Singapore and St Vincent-Tonga do not need to apply for a visa to enter Uganda. See Uganda immigration website: http://visas.immigration.go.ug/#/help (**Annex 131**).

United Kingdom of Great Britain and Northern Ireland,[234] and the United States of America.[235]

120. All of these States Parties therefore grant unequal enjoyment of rights on the basis of current nationality, a State practice which Qatar seeks to condemn as a violation of the CERD in this case.

(b) Political Rights, Article 5(c)

121. In political rights too, States Parties treat individuals differently for no other reason than the nationality they hold. Thus the United Kingdom grants voting rights to citizens of the Republic of Ireland and of some Commonwealth States but not to citizens of other States.[236] Barbados,[237] Ireland,[238] and Jamaica[239] also grant voting rights to the citizens of other Commonwealth States, but not to other foreign citizens. Citizens of an EU Member State, furthermore,

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[234] Immigration Rules, Appendix V (Visitor Rules), Part V1.2 and Appendix 2 (**Annex 132**).

[235] *See* 8 U.S.C. § 1187(a)(2) (authorizing the Secretary of Homeland Security and the Secretary of State to waive the requirement to obtain a visa to enter the United States of America for nationals of a country which "extends (or agrees to extend) . . . reciprocal privileges to citizens and nationals of the United States" and "is designated as a pilot program country." Travellers who are nationals of Visa Waiver Program countries who are also nationals of Iraq or Syria, or other States designated by the Secretary of State or the Secretary of Homeland Security, are not eligible for the waiver program and must apply for visas to gain entry to the United States of America. *See* 8 U.S.C. § 1187(a)(12)(A)(ii)(I) (**Annex 133**).

[236] United Kingdom, Representation of the People Act 2000, s. 1 and s. 2 (**Annex 134**).

[237] Foreign nationals of Commonwealth States who have resided in Barbados for at least three years are eligible for the right to vote in Barbadian elections, whilst other foreign nationals are not eligible. Representation of the People Act 1991, s. 7, available at: http://aceproject.org/ero-en/regions/americas/BB/barbados-representation-of-the-people-act-2007 (**Annex 135**).

[238] British nationals resident in Ireland can vote in elections to the lower house of the Irish Parliament (the Dáil Éireann), but no other foreign national in the same position can do the same. Electoral Act 1992, s. 8(2)(a) (**Annex 136**). This section also provides that nationals of other Member States which are the subject of an executive declaration may vote in elections to the Dáil Éireann, but no such declaration appears to be in force: see Irish Parliament, Voting in Ireland, available at: http://www.oireachtas.ie/en/visit-and-learn/how-parliament-works/voting-in-ireland/ (stating that only Irish and British nationals who live in Ireland may vote) (**Annex 137**).

[239] Commonwealth nationals (unlike other foreign nationals) resident in Jamaica can vote in political elections and referendums as Jamaican nationals. Fundamental Rights (Additional Provisions) (Interim) Act, ss. 4(1), 4(2) and 4(3) (**Annex 138**).

who reside in another Member State, may vote and may stand as candidates in the municipal elections of the State in which they reside.[240] Yet again, this State practice would run foul of obligations under the CERD if Qatar's interpretation of "national origin", equating it with current nationality, were to be accepted.

(c) Right to Education and Training, Article 5(e)(v)

122. Members of the South African Development Community treat citzens of other members as home students for the purposes of fees and accommodation.[241] Denmark,[242] France[243] and the United Kingdom[244] have similar rules for citizens of other EU and EEA Member States. In Chile[245] and India,[246] eligibility for certain government scholarships is only extended to citizens of certain States. All of these States thus treat individuals differently based purely on what nationality they hold without any apparent concern that such practice violates the CERD.

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[240] Treaty on the Functioning of the European Union, *Official Journal of the European Union*, doc. C 326, 26 October 2012, p. 47, Article 22(1); Charter of Fundamental Rights of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012, p. 391, Article 40.

[241] Protocol on education and training in the Southern African Development Community, Article 7(A)5 (**Annex 139**).

[242] Higher education in Denmark is free for EU, EEA and Swiss nationals, whilst other foreign nationals must pay annual tuition fees and a fee to apply for a visa to study. Danish Ministry of Higher Education and Science, Study in Denmark, Tuition Fees & Scholarships, available at: http://studyindenmark.dk/start-page/study-options/tuition-fees-scholarships (**Annex 140**).

[243] Nationals of an EU Member State, an EEA State or Switzerland may be eligible for certain scholarships for which other foreign nationals cannot be eligible. Circular No. 2018-079, 25 June 2018, Appendix I, para. 2.3 (**Annex 141**).

[244] Subject to certain conditions, nationals of EU Member States, EEA States and Switzerland may not be charged more tuition fees than British nationals at publicly funded institutions in England. By contrast, nationals of other States may be charged higher fees than their British colleagues. Education (Fees and Awards) (England) Regulations 2007, s. 4 and Schedule 1 (**Annex 142**).

[245] Only nationals of Latin American States and CARICOM States are eligible. Decree 97 of 2013, 22 February 2013, Article 1 (b), available at: http://www.leychile.cl/Navegar?idNorma=1055001 (**Annex 143**).

[246] Indian Council for Cultural Relations, "General Scholarship Scheme-GSS", available at: http://www.iccr.gov.in/content/general-scholarships-scheme-gss (**Annex 144**).

(d) Right to Work, Article 5(e)(i)

123. Jamaica does not require citizens of other CARICOM States to possess a permit to work in the country — a permit which citizens of other States do need.[247] Similarly, citizens of EU Member States enjoy freedom of movement within the EU for the purposes of employment, a right that is not generally enjoyed by citizens of other States.[248]

(e) Property Rights, Article 5(d)(v)

124. In Singapore, Malaysian citizens renting public flats are exempt from quotas imposed on the proportion of flats in a public housing estate that other foreign citizens may rent.[249] Under Australian law, citizens of States with which Australia has a free trade agreement must meet certain conditions, which are different from those for citizens of other foreign States, to receive government approval of foreign investments.[250] New Zealand similarly differentiates between citizens of different foreign States in relation to property ownership.[251]

(f) Social Security, Article 5(e)(iv)

125. States Parties grant social security and like benefits to citizens of some foreign States but deny it to others. New Zealand and Australia, for

[247] Foreign Nationals and Commonwealth Citizens (Employment) Act, s. 3 (**Annex 145**).

[248] Treaty on the Functioning of the European Union, *Official Journal of the European Union*, doc. C 326, 26 October 2012, p. 47, Article 45.

[249] Singapore Government, Housing and Development Board, Regulations for Renting Out Your Flat, available at: http://www.hdb.gov.sg/cs/infoweb/residential/renting-a-flat/renting-from-the-open-market/regulations-for-renting-out-your-flat (**Annex 146**).

[250] Foreign Acquisitions and Takeovers Regulation 2015 (Cth), s. 5 (definition of "agreement country" and "agreement country investor") (**Annex 147**); Australian Government, Foreign Investment Review Board, Guidance Note 34 (**Annex 148**).

[251] Overseas Investment Act 2005, s. 61B (**Annex 149**); Overseas Investment Regulations 2005, ss. 75-82 and Part 5 (**Annex 150**).

example, grant reciprocal benefits to citizens of the other State.[252] They do not do the same for citizens of other States. If Qatar's position is to be accepted, this differentiation, though practiced by States Parties, would be prohibited as "racial discrimination based on national origin" under Article 1(1) of the CERD.

126. Numerous further examples of differentiated treatment on the basis of nationality practised by States could be cited. In summary, the above demonstrates that Qatar's poorly conceived proposed interpretation of the term 'national origin' as encompassing current nationality would be inconsistent with established and routine State practice.

(g) Qatar Differentiates on the Basis of Current Nationality

127. Qatar, no less, under its domestic legislation treats citizens 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, as:

- Citizens of only some States may enter Qatar without a visa.[253]

- Citizens of GCC members enjoy greater rights in land ownership,[254] access to medicine,[255] ability to practise

[252] Social Security (International Agreements) Act 1999, Schedule 3 (**Annex 151**); Paid Parental Leave Act 2010 (Cth) (**Annex 152**), s. 45.

[253] State of Qatar, Ministry of Interior, "Qatar Visas", available at: https://portal.moi.gov.qa/qatarvisas/index.html (**Annex 93**); 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 (**Annex 94**).

[254] Law No. 17 of 2004 Regarding Organization and Ownership and Use of Real Estate and Residential Units by non-Qataris, Articles 2-4 (**Annex 95**).

[255] Law No. 7 of 1996 Organizing Medical Treatment & Health Services within the State, Article 2 (**Annex 96**); 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 (**Annex 97**).

certain professions,[256] and admission and fees in higher education than citizens of other States.[257]

- Jobs in government agencies are given in priority to Qatari citizens 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."[258]

128. Qatar's actions are not consistent with the interpretation of "national origin" which it presents in these proceedings, aimed at dragging the acts complained of within the meaning of "racial discrimination" as defined in the CERD. Qatar's own practice, however, and the widespread practice of other States Parties to the CERD (of which the above examples were only illustrative[259]) 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 engage the Convention or the jurisdiction of the Court.

129. Qatar, as other States Parties do, differentiates on the basis of current nationality. Yet it is just such differentiation by the UAE of which Qatar now complains. That hypocrisy alone reveals Qatar's true intention: to bring proceedings against the UAE under the CERD, not to enforce rights protected by

[256] Law No. 23 of 2006 regarding Enacting Code of Law Practice, Article 13 (**Annex 98**); 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 (**Annex 99**).

[257] 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 (**Annex 100**).

[258] Law No. 8 of 2009 on Human Resources Management 8/2009, Article 14 (**Annex 101**).

[259] *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.").

the CERD, not to right any wrong, but rather to pursue political ends. It is respectfully suggested that the Court should not entertain such puerile claims.

8. General Recommendation XXX of the CERD Committee Does Not Support Qatar's Case

130. Qatar relies on General Recommendation XXX (2004) of the CERD Committee to support its argument that different treatment on the basis of current nationality does not fall outside the ambit of the Convention.[260] The Recommendation does not support Qatar's argument. 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.[261] The Recommendation then is of less weight than other sources of treaty interpretation when seeking to determine the meaning of "national origin" in Article 1(1) of the CERD.

131. 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

[260] *See, e.g., 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, paras. 56, 59.

[261] 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.

> Convention relating to special measures is not considered discriminatory.[262]

132. On the basis of this paragraph, Qatar argues that "Article 1(2) does not permit States Parties to distinguish between different groups of non-nationals."[263]

133. In making this assertion, Qatar omits any reference to the part of paragraph 4 in emphasis above, *i.e.*, the fact that differential treatment must be "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 CERD Committee did not purport to add "citizenship or immigration status" or "nationality" to the grounds of "racial discrimination" contained in Article 1(1) of the CERD; nor would it have been able to do so.[264] The Committee's aim was obviously 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 as defined in the CERD. 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.

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[262] *Official Records of the General Assembly, Fifty-ninth session*, Supplement No. 18, doc. A/59/18, p. 4 (emphasis added).

[263] *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. 56.

[264] *See also 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. 5.

134. In any event, whilst the Court may ascribe weight to the interpretation of the CERD given by the Committee, it "is in no way obliged . . . to model its own interpretation . . . on that of the Committee".[265] The question of whether "national origin" means or encompasses nationality was not squarely before the Committee for full consideration in its General Recommendation XXX. Nor, with respect to that question, did the Committee undertake the interpretive exercise required by the rules of treaty interpretation codified in Articles 31 and 32 of the VCLT, the relevant elements of which are applied in the sections above.

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135. Thus on all counts the CERD does not cover differential treatment based on current nationality. A good faith interpretation of the ordinary meaning of "national . . . origin" in Article 1(1), read in its context and in light of the object and purpose of the CERD, reflects the discussions which went into the making of the Convention and 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. The alleged acts complained of in Qatar's Application thus do not concern the interpretation or application of the CERD and the Application therefore does not come within the compromissory clause of the CERD.

136. Moreover, regarding Qatar's factual allegations in respect of certain alleged breaches of the CERD concerning interferences with freedom of expression, these allegations are limited to alleged interference with the exercise of freedom of expression by Qatari entities. Given that the relevant entities are corporations and not individuals, they are not protected by the CERD. In any

[265] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, p. 664, para. 66.

event, there cannot be racial discrimination within the meaning of the CERD, as the effects of the blocking of transmissions are felt by all individuals within the UAE. Therefore, the blocking of transmissions cannot be characterized as discriminatory, whether on the basis of "national origin" nor on any other of the prohibited grounds of discrimination under the CERD. There is thus no sustainable allegation that the blocking of Qatari media outlets within the UAE interferes with the exercise of the freedom of expression of Qatari nationals or of any other individual in an impermissibly discriminatory manner falling within the scope of the Convention. In this regard, there is no dispute as to violation of the Convention. To the contrary, the blocking of certain Qatari media outlets that are known to provide a platform for terrorist groups and individuals[266] was performed by the UAE in furtherance of the objective of limiting discriminatory and hate speech.

137. Similarly, as regards Qatar's allegation that UAE criminal legislation is applied so as to criminalize the expression of sympathy towards Qatar and Qataris, there is nothing in this legislation or in the Attorney General's statement on which Qatar relies that implicates the UAE's obligations under the CERD. First, the announcement by the Attorney General of the UAE relates only to expressions of sympathy for Qatar (and not Qataris). Second, and in any event, the relevant legislation, UAE Federal Decree Law No. 5 of 2012, is a law of general application that was enacted well in advance of the crisis with Qatar It applies in a non-discriminatory fashion to everyone within the UAE, irrespective of race, colour, descent, or national or ethnic origin.

138. Accordingly, the Court does not have jurisdiction *ratione materiae* over Qatar's Application.

[266] *See* paras. 20-23 *supra*.

IV. SECOND PRELIMINARY OBJECTION: QATAR HAS NOT FULFILLED THE PROCEDURAL PRECONDITIONS OF ARTICLE 22 OF THE CONVENTION

139. Article 22 of the CERD provides that:

> 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.[267]

140. As stated by the Court in its judgment of 2011 in the *Georgia v. Russian Federation* case, Article 22 of the CERD is a compromissory clause.[268] It entitles States Parties to the CERD to submit unilaterally to the Court disputes concerning the interpretation or application of the Convention and only such disputes. It does not exclude recourse to other procedures "for settling disputes or complaints" applicable as between the parties.[269]

141. The compromissory clause of Article 22 is the sole basis on which Qatar asserts that the Court has jurisdiction to hear its claims. It also sets the limits of the Court's jurisdiction. As the Court stated:

> [I]ts jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . .. When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.[270]

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[267] CERD, Article 22.

[268] *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. 70, p. 121, para. 118.

[269] CERD, Article 16.

[270] *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*, p. 6, p. 39, para. 88. *See also Application of the International Convention on the Elimination of All Forms*

142. Among the limits set out in this compromissory clause is the condition 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 Court stated that with these terms the Convention establishes "preconditions to be fulfilled before the seisin of the Court".[271] More recently, in its Order of 23 July 2018, the Court specified that these preconditions are "procedural".[272]

143. 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. The Court has not yet decided whether the two procedural preconditions in Article 22 of the CERD are cumulative or alternative.[273] More specifically, the Court has not yet determined whether an applicant State must pursue as far as possible both negotiation and the procedures expressly provided for in the CERD before referring a dispute to the Court.

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of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70, p. 124, para. 131.

[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. 70, p. 128, para. 141 ("in their ordinary meaning, the terms of Article 22 of CERD, namely '[a]ny dispute . . . which is not settled by negotiation or by the procedures expressly provided for in this Convention', establish preconditions to be fulfilled before the seisin of the Court.").

[272] *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, p. 11, para. 29.

[273] *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. 70, p. 140, para. 183; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 104, pp. 125-126, para. 60; *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, p. 14, para. 39.

144. As argued in detail below, the correct interpretation of Article 22 of the CERD is that the consent of States Parties to the CERD for disputes with respect to the interpretation or application of the Convention to be referred to the Court is conditional upon neither negotiation nor the procedures expressly provided under the CERD having settled the dispute. That means that both "preconditions" must have been pursued as far as possible.

145. Qatar has not pursued as far as possible either negotiation or the CERD procedures. It has failed to satisfy either precondition individually as well as having failed to satisfy them both cumulatively. Consequently, the Court has no jurisdiction to hear Qatar's Application.

A. JURISDICTION IS LIMITED TO DISPUTES SETTLED NEITHER BY NEGOTIATION NOR BY THE PROCEDURES EXPRESSLY PROVIDED FOR IN THE CERD

146. Neither in its Application, nor during the June 2018 Provisional Measures proceedings, has Qatar confronted the fact that it has not fulfilled the requirement of the procedures provided for in the Convention. To the contrary, Qatar has sought to characterize the Article 22 preconditions as inconsequential, in particular ignoring the requirement to pursue the procedures of Articles 11-13 of the CERD in full.

147. In a footnote to its Application, Qatar baldly asserts that:

> While the CERD Committee procedure set out in Articles 11-13 of the CERD provides a framework by which the parties might come to a consensual resolution, initiation or completion of that procedure is not a precondition to the Court's exercise of jurisdiction.[274]

[274] *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, p. 14, n. 28.

148. In a similar vein, during the oral hearing in June 2018, counsel for Qatar stated that Qatar "did not see the CERD procedure as inhibiting its access to this Court in any way".[275] As recently as February 2019, in a submission to the CERD Committee, Qatar insisted on this point, stating that "a State Party may refer a dispute to the Court without any recourse to [the CERD] Committee".[276]

149. An interpretation of Article 22 of the CERD in accordance with the customary international law rules of treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties shows that satisfaction of both the procedural preconditions is not a matter left to the unilateral discretion of the applicant State.[277] On the contrary, the preconditions are mandatory.

150. It is clear from the ordinary meaning of the terms of Article 22 of the Convention taken in their context that both the preconditions of negotiation and the procedures provided for in the Convention must be met before a State can submit a dispute to the Court. The *travaux préparatoires* confirm this interpretation.

1. A Good Faith Interpretation of the Ordinary Meaning of the Terms of Article 22 of the CERD in their Context Confirms the Cumulative Nature of the Preconditions in that Article

151. Article 22 of the Convention refers not only to negotiation, but also to the procedures expressly provided for in the Convention, *i.e.*, Articles 11-13 of the CERD. For the Court to have jurisdiction under Article 22, a dispute must

[275] *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 a.m. (CR 2018/14), 29 June 2018, p. 16, para. 26 (Martin). See also *id*., 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. 25, para. 25 (Donovan).

[276] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Response of the State of Qatar, 14 February 2019, para. 178 (**Annex 18**).

[277] *See* para. 164, *infra*.

have been settled neither by negotiation nor by the CERD procedures. The argument that the alternative character of the preconditions is supported by the use of the term "or" left "unimpressed" even the five judges who, in the *Georgia v. Russian Federation* Preliminary Objections case, for different reasons, concluded that the preconditions are alternative.[278] The five judges further specified: "Matters become less clear however when 'or' is used in a clause in the negative, as in the present case ('which is *not* settled by negotiation or by the procedures . . .'). In such a case, 'or' need not mean something other than 'and', but the latter word cannot be used because it would not make sense in the context of the sentence. In fact, here, 'or' is the equivalent of 'neither . . . nor': any dispute which is settled neither by negotiation nor by the procedures expressly provided."[279]

152. Article 22 of the CERD deliberately prescribes two different means to seek a consensual resolution of a dispute before recourse may be had to the Court: where one may fail the other may succeed, depending on particular circumstances. For example, the fact that direct negotiations may fail does not, of course, mean that facilitated negotiation cannot provide a mutually acceptable solution to the parties to a dispute. To the contrary, frequently, it is specifically the addition of a third-party facilitator that allows a failed direct negotiation to be replaced by a successful facilitated negotiation. The recent example of the Timor-

[278] *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. 70, p. 156, para. 42.

[279] *Id. See also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, 28 June 2018 at 10 a.m. (CR 2018/13), pp. 18-19, para. 8(3)-(4) (Pellet); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, 29 June 2018 at 4:30 p.m. (CR 2018/15), pp. 13-14, paras. 9-10 (Pellet) (explaining the logic of the use of "or" rather than "and" in Article 22 of the CERD).

Leste Conciliation — in which, as in the case of the CERD, the Conciliation Commission could be seized unilaterally by one party — demonstrates this.[280]

153. For it to be established that the dispute has been settled neither by negotiation nor the procedures under Articles 11-13 of the CERD, each must have been pursued as far as possible, and each must have failed to settle the dispute. This interpretation respects the ordinary meaning of the terms of Article 22 of the Convention and permits the phrase "or by the procedures expressly provided for in this Convention" to produce an effect, in accordance with the principle of effectiveness (*effet utile*).[281]

154. On their face, (i) negotiation and (ii) the CERD procedures are two distinct means of seeking to achieve the same outcome: a consensual resolution of a dispute under the CERD.

155. Negotiations play an especially relevant role. Not only does Article 22 refer to them as such, but it refers to them as part of the "procedures expressly provided for" in the Convention. In fact, Article 11(2) envisages that, after complying with the requirements of Article 11(1), either State has the right to engage the Committee "if the matter is not adjusted to the satisfaction of both parties either by *bilateral negotiations* or by other procedures open to them".[282] Consequently, for the requirements of the compromissory clause of Article 22 to be satisfied, the fact that negotiations have been pursued is essential: even if

[280] *In the Matter of the Maritime Boundary between Timor-Leste and Australia ("The Timor Sea Conciliation"), PCA Case No. 2016-10, Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea, 9 May 2018*; Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime Boundaries in the Timor Sea, 6 March 2018, available at: http://pcacases.com/web/sendAttach/2356.

[281] *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A. No. 22*, p. 5, p. 13; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4, p. 24; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, p. 19, para. 35.

[282] CERD, Article 11(2) (emphasis added).

negotiation has not been pursued outside the framework of the CERD, once the CERD proceedings are started under Article 11(1) they cannot be continued under Article 11(2) unless negotiations have been engaged in and pursued as far as possible. Thus, under Article 22 the Court cannot be seized unless negotiations have been pursued as far as possible.

156. Qatar wrongly seeks to diminish the significance of Articles 11-13 of the Convention. Contrary to Qatar's position, the procedures of Articles 11-13 of the CERD are more than an optional framework by which the States Parties may choose to come to a consensual resolution of a dispute. Rather, recourse to the CERD procedures is a prerequisite, which must be satisfied before a State can refer a dispute to the Court. They go to the core of the consent of the States Parties to the jurisdiction of the Court and cannot be brushed aside as a mere technical impediment.

157. The procedures in Articles 11-13 of the CERD constitute a specific and tailored mechanism to address allegations of breaches of the Convention. This mechanism was developed and explained in detail throughout the CERD negotiations. Indeed, as the terms of Article 22 of the CERD confirm, these procedures are *expressly* provided for in the CERD ("以本公约所明定的程序解决者" in Chinese, "des procédures *expressément* prévues" in French; "процедур, специально предусмотренных" in Russian; and "los procedimientos que se establecen *expresamente*" in Spanish) for the specific purpose of resolving disputes between States Parties concerning violations of obligations under the CERD.

158. Article 16 of the CERD further confirms that the procedures in Articles 11-13 of the CERD are integral to the implementation mechanism of the Convention and, thus, to States Parties' consent to the Court's jurisdiction.

Article 16 is the final provision in Part II of the Convention, which also includes Articles 11-13 of the CERD. It provides:

> The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

159. This demonstrates that the procedures in Articles 11-13 of the CERD are "provisions of this Convention concerning the settlement of disputes" and go to the very essence of the consent given by the States Parties. Article 16 of the Convention allows States Parties to have recourse to other dispute resolution mechanisms in accordance with general or special international agreements in force between them. For instance, States that have accepted the Court's compulsory jurisdiction under Article 36(2) of the Statute of the Court could potentially rely on their optional clause declarations in order to submit a dispute under the CERD to the Court. However, where States rely on the dispute settlement provisions of the CERD (including Article 22) to resolve their disputes, they cannot simply ignore the procedures expressly established by the Convention.

160. Moreover, the procedures expressly provided for in Articles 11-13 of the CERD are <u>not</u> merely another form of direct negotiation, as Qatar has suggested.[283] This is demonstrated by the fact of these procedures being listed alongside, but separately from, "negotiation" in Article 22 of the CERD. Articles

[283] *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 a.m. (CR 2018/14), p. 15, para. 21 (Martin).

11-13 of the CERD provide for specific inter-State procedures in the event that a State party "considers that another State party is not giving effect to the provisions of this Convention".[284] These procedures are designed to reach a consensual settlement between the States Parties through the intermediary of the Committee and the good offices of the *ad hoc* Conciliation Commission. The various steps involved under the CERD process — which, unlike in a direct negotiation, are strictly prescribed — are summarised below.

161. Under the CERD mechanism, the two States Parties begin by formally exchanging their respective positions and views through the CERD Committee within a specified timetable:

(a) a State party which considers that another State party is not complying with its obligations under the Convention may address a communication to the latter through the CERD Committee,[285] which receives and forwards the communication;[286] and

(b) the receiving State is obliged[287] to submit to the CERD Committee its written explanations or statements within three months.[288]

162. If no solution can be found between the States Parties at this stage of the CERD procedures, including, as emphasised above, by "bilateral

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[284] CERD, Article 11(1).

[285] CERD, Article 11(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. . . ."

[286] CERD Committee, Rules of Procedure, CERD/C/35/Rev.3, Rule 69(1) ("When a matter is brought to the attention of the Committee by a State party in accordance with article 11, paragraph 1, of the Convention, the Committee shall examine it at a private meeting and shall then transmit it to the State party concerned through the Secretary-General. The Committee in examining the communications shall not consider its substance. Any action at this stage by the Committee in respect of the communication shall in no way be construed as an expression of its views on the substance of the communication.").

[287] *See Third Committee, 1353rd meeting*, 24 November 1965, A/C.3/SR.1353, p. 372, para. 38 (**Annex 42**).

[288] CERD, Article 11(1) ("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.").

negotiations", the dispute can be referred to the CERD Committee "again" six months after the procedure started.[289] Article 11(2) envisages recourse only to the CERD Committee. That provision does not refer to the Court.

163. When seized under Article 11(2) of the Convention, the CERD Committee must "[ascertain] that all domestic remedies have been invoked and exhausted".[290]

164. After making such ascertainment and after it "has obtained and collated all the information it deems necessary", the Committee "shall appoint an *ad hoc* Conciliation Commission". The Commission is composed of five members whose "good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention".[291] The CERD prescribes the organisation of the work of the *ad hoc* Conciliation Commission,[292] including provisions for avoiding any possible deadlock in the establishment of the Commission.[293] The procedure is

[289] CERD, Article 11(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").

[290] CERD, Article 11(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.").

[291] CERD, Article 12(1)(a) ("After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention").

[292] CERD, Article 12(2)-(8).

[293] CERD, Article 12(1)(b) ("If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members").

compulsory[294] and continues regardless of any resistance from the States Parties concerned.

165. After having "fully considered" the matter, the *ad hoc* Conciliation Commission submits to the Chairman of the CERD Committee a report with its findings "on all questions of fact relevant to the issue" and recommendations for the amicable resolution of the dispute.[295] Each party to the dispute can choose whether or not to accept the recommendations of the Conciliation Commission.[296] If the recommendations are not accepted by one or both States, this is communicated to the CERD Committee and all States Parties to CERD.[297] This is the final step of the CERD procedures. Only after one of the parties to the dispute indicates that it does not accept the recommendations of the Committee can the requirement under Article 22 of the dispute not having been settled by the "procedures expressly provided for in th[e] Convention" be considered as satisfied.

[294] As noted by the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, compulsory conciliation designates "conciliation in which participation in the process is mandatory but the results are nevertheless non-binding" (*In the Matter of the Maritime Boundary between Timor-Leste and Australia ("The Timor Sea Conciliation"), PCA Case No. 2016-10, Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea, 9 May 2018,* p. 17, para. 52).

[295] CERD, Article 13(1) ("When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute").

[296] CERD, Article 13(2) ("The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission").

[297] CERD, Article 13(3) ("After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention").

2. The Travaux Préparatoires *of the Convention Confirm the Cumulative Nature of the Preconditions Set Out in Article 22*

166. The *travaux préparatoires* of what ultimately became Article 22 of the CERD confirm that comprehensive recourse to the procedures expressly provided for in the Convention was considered to constitute an essential prerequisite before referring a dispute to the Court.

167. The initial text dealing with the resolution of inter-State complaints under the CERD was proposed by Mr. Ingles, a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as part of his proposal for measures to implement the Convention.[298] The logic of Mr. Ingles' proposal was that:

> Under the proposed procedure, States Parties to the convention should first refer complaints of failure to comply with that instrument to the State party concerned; it is only when they are not satisfied with the explanation of the State party concerned that they may refer their complaint to the Committee. Direct appeal to the International Court of Justice, provided for in both the Covenants on Human Rights and the UNESCO Protocol, was also envisaged in his draft.[299]

168. Mr. Ingles' proposal included the establishment of a Conciliation Committee, because the settlement of disputes involving human rights "did not always lend themselves to strictly judicial procedure".[300] The envisaged role of the Conciliation Committee would be to:

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[298] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Proposed Measures of Implementation by Mr. Ingles, 17 January 1964, E/CN.4/Sub.2/L.321 (**Annex 43**).

[299] *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, *427th meeting*, 28 January 1964, E/CN.4/Sub.2/SR.427, p. 12 (**Annex 31**). *See also Commission on Human Rights*, *810th meeting*, 15 May 1964, E/CN.4/ SR.810, p. 7 (Quiambao) **(Annex 37)**.

[300] *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, *427th meeting*, 28 January 1964, E/CN.4/Sub.2/SR.427, p. 12 (**Annex 31**).

> ascertain the facts before attempting an amicable solution to the dispute. Application could be made by the Committee, through the Economic and Social Council, for an advisory opinion from the Court on legal issues. If the Committee failed to effect conciliation within the time allotted, either of the parties may take the dispute to the International Court.[301]

169. In accordance with this logic, Draft Article 17 of Mr. Ingles' proposal prescribed recourse to the Court only in the event that no prior solution had been reached between the States Parties with the help of the Conciliation Commission.[302]

170. In the Third Committee of the General Assembly, the delegation of the Philippines explained that the procedural rules it proposed, on the basis of Mr. Ingles' draft:

> would provide for the establishment of a good offices and conciliation committee to which States Parties might complain on grounds of non-implementation of the Convention, but only after all domestic remedies had been exhausted. If a solution could not be reached, the committee would draw up a report on the facts and indicate its recommendations. Eventually the States Parties could bring the case before the International Court of Justice.[303]

171. The delegate of the Netherlands also explained that:

> The system of complaints proposed by the Philippines (A/C.3/L.1221) and Ghana (A/C.3/L.1274/Rev.1) provided that, if a matter was not adjusted to the satisfaction of both the complaining State and the State complained against, either by

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[301] *Id.*

[302] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Proposed Measures of Implementation by Mr. Ingles, 17 January 1964, E/CN.4/Sub.2/L.321, p. 6, Article 17 ("The States Parties to this Convention agree that any state Party complained of or lodging a complaint may, if no solution has been reached within the terms of article 14, paragraph l, bring the case before the International Court of Justice after the report provided for in article 14, paragraph 3, has been drawn up") (**Annex 43**).

[303] *Third Committee, 1344th meeting*, 16 November 1965, A/C.3/SR.1344, p. 314, para. 16 (**Annex 44**).

> bilateral negotiations or by any other procedure open to them, either State should have the right to refer the matter to a committee, which in the Philippine text was a good offices and conciliation committee and in the Ghanaian text a fact-finding committee, conciliatory powers being vested in an ad hoc commission appointed by the chairman of the committee. Under that system, the case might be referred to the International Court of Justice *as a last resort*.[304]

172. The Third Committee did not consider Draft Article 17 further. Instead, it discussed the draft provision which ultimately became Article 22 of the CERD.[305] This draft provision, contained in the Convention's "final clauses", was proposed by the Secretariat of the Third Committee on the basis of similar final clauses in other contemporaneous human rights instruments.[306] As first proposed by the Secretariat, it read as follows:

> 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 for decision, unless the disputants agree to another mode of settlement.[307]

173. Delegations in the Third Committee did not consider that this draft provision sufficiently reflected the principle that recourse to the Court was limited to disputes that could not be resolved through the intermediary of the CERD

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[304] *Id.*, p. 319, para. 63 (emphasis added).

[305] Commission on Human Rights, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Final Clauses, Working Paper prepared by the Secretary-General, 17 February 1964, E/CN.4/L.679, pp. 15-16 (**Annex 45**).

[306] *See, e.g.*, Convention on the Political Rights of Women, 1952, Article IX; Convention Relating to the Status of Refugees, 1951, Article 38; Convention on the International Right of Correction, 1952, Article V; Convention Relating to the Status of Stateless Persons, 1954, Article 34; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Article 10; Convention on the Nationality of Married Women, 1957, Article 10.

[307] United Nations, General Assembly, Third Committee, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Suggestion of final clauses submitted by the Officers of the Third Committee, 15 October 1965, A/C.3/L.1237, p. 4, clause 8 (**Annex 46**).

Committee, as expressly provided for under the CERD, *i.e.*, the logic previously contained in Draft Article 17. Ghana, Mauritania and the Philippines therefore proposed an amendment to the dispute settlement provision of what became Article 22. The amendment specifically sought to include the reference to "procedures expressly provided for under this Convention" after "negotiation", thereby further conditioning recourse to the Court.

174. This amendment was described by the Ghanaian representative as "self-explanatory", because: "[p]rovision 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".[308] The French representative explained that: "His delegation would support the three-Power amendment since it brought [Article 22] into line with provisions already adopted in the matter of implementation".[309] Belgium expressed the view that the amendment "introduced a useful clarification"[310] and Italy considered that the added text was "a useful addition".[311] The amendment was unanimously adopted.

175. With respect to Article 22 of the CERD, the Court also remarked in the *Georgia v. Russian Federation* 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-

[308] *Third Committee, 1367th Meeting*, 7 December 1965, A/C.3/SR.1367, p. 453, para. 29 (**Annex 47**).

[309] *Id.*, p. 454, para. 38.

[310] *Id.*, p. 454, para. 40.

[311] *Id.*, p. 454, para. 39.

> limits were provided for with a view to facilitating wider acceptance of CERD by States.[312]

176. 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" [313] but also to strengthen the role of these newly established procedures.

177. The *travaux préparatoires* thus confirm that the ultimate position adopted in relation to Article 22 of the CERD was to make prior resort to negotiation and the prescribed CERD procedures cumulative prerequisites to recourse to the Court.

178. In sum, a good faith interpretation of the ordinary meaning of the terms of Article 22 in their context, and the *travaux préparatoires*, demonstrate that the correct interpretation of Article 22 of the Convention is that consent to the Court's jurisdiction is conditional upon neither negotiation nor the procedures provided for in the CERD having settled the dispute. Both negotiation and the procedures under the CERD must have been pursued as far as possible, and both must have failed to settle the dispute, before the Court will have jurisdiction under Article 22.

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[312] *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.

[313] *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.

B. QATAR HAS FAILED TO SATISFY EITHER OF THE CUMULATIVE PROCEDURAL PRECONDITIONS OF ARTICLE 22 OF THE CONVENTION

179. Qatar has not met either of the cumulative preconditions set out in Article 22 of the CERD. Contrary to its assertions in the Application and in the Provisional Measures hearing, it has not made a genuine attempt to negotiate with the UAE in respect of a dispute regarding the Convention. Furthermore, while Qatar submitted its Communication to the CERD Committee invoking Article 11(1) of the CERD, it subsequently submitted the present case to the Court before exhausting the CERD Committee procedure. In doing so, Qatar thus abandoned the procedures expressly provided for under the CERD. It later referred the matter again to the CERD Committee invoking Article 11(2) of the Convention. This pursuit of parallel proceedings under the linear dispute resolution procedure of Article 22 of the CERD constitutes an abuse of the CERD.[314]

180. As a threshold point, it should be noted that Qatar's assertions concerning its purported fulfilment of the preconditions set out in Article 22 of the CERD are based on the fundamentally flawed proposition that there was, and is, only one narrow dispute between Qatar and the UAE — and that this dispute concerns breaches of the CERD. However, no such dispute concerning CERD was even alleged to exist before 8 March 2018. Rather, the exchanges until that time concerned the real and broader dispute between the parties stemming from Qatar's financing and support of terrorism and extremism, its interference in the internal affairs of its neighbouring States, and its incitement of hatred and violence in the Gulf region through its State-owned and State-controlled media.[315] For this reason, and as will be shown below, notwithstanding various

[314] *See* para. 219, *infra*. *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 to Preserve the United Arab Emirates' Procedural Rights and to Prevent Qatar from Aggravating or Extending the Dispute, Submitted by the United Arab Emirates, 22 March 2019, paras. 34-48.

[315] *See* paras. 17-29, *supra*.

communications between the parties prior to March 2018, Qatar never proposed to hold negotiations with the UAE regarding alleged breaches of the CERD.

181. On 8 March 2018, Qatar submitted its Communication to the CERD Committee [316] and, for the first time, raised allegations of the UAE breaching its obligations under the CERD. Even then, however, Qatar did not meaningfully engage with the procedures provided for under the Convention or meaningfully attempt direct negotiation. Rather, just as Qatar has artificially fabricated a dispute that it (incorrectly) claims relates to the interpretation and application of the CERD, so too has Qatar superficially sought to "tick the procedural boxes" in order to seek to say that it has met the Article 22 preconditions required to bring this purported CERD dispute before the Court.

1. Before 8 March 2018, Qatar Never Proposed to Negotiate or Otherwise Address a Dispute Concerning the CERD

182. In its Application, Qatar asserts that: "the parties have not been able to settle their dispute despite genuine attempts by Qatar to negotiate with a view toward resolving the dispute". It also claims that "further attempts at negotiations would be futile, and waiting any longer is prejudicial to Qataris currently suffering as a result of the UAE's violations of the CERD".[317] In a footnote, Qatar suggests that "where the UAE has stated that its demands are non-negotiable, its conduct has made evident that reliance on negotiations would be futile, and . . . Qatar has concluded that it must invoke the jurisdiction of this Court to achieve a binding resolution of the dispute".[318]

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[316] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018 (**Annex 12**).

[317] *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, pp.13-14, para. 19.

[318] *Id.*, p. 14, n. 28.

183. A true reading of the record demonstrates that, prior to 8 March 2018, no negotiations, whether direct or otherwise, were proposed or undertaken by the parties in relation to any CERD dispute. Rather, all of the encounters, exchanges of views, or statements made in the framework of international meetings or international organizations were, until March 2018, at best unilateral accusations made by Qatar, followed by rebuttals of the UAE and other States in the region.

184. In this regard, the Court has emphasised the importance of negotiations meeting certain requirements, noting that:

> [N]egotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counterclaims. As such, the concept of 'negotiations' differs from the concept of 'dispute', and *requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.*[319]

185. Moreover, prior to 8 March 2018, none of the statements and exchanges relied upon by Qatar ever mentioned a dispute concerning the interpretation or application of the CERD or even racial discrimination. At most, these statements could be said to concern the wider regional dispute relating to the actions of Qatar leading to the severance by various other States in the region, including the UAE, of diplomatic relations with Qatar.

186. The precise subject-matter of negotiations is important. In *Georgia v. Russian Federation*, the Court addressed the issue of the particular subject of negotiations, or of a serious offer to negotiate, specifically in the context of Article 22 of the CERD. According to the Court:

[319] *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. 70, p. 132, para. 157 (emphasis added).

> [T]o meet the precondition of negotiation in the compromissory clause of a treaty, these 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.[320]

187. Thus the Court determined that, although it is not necessary expressly to mention or to refer to the provisions of the treaty in question,[321] to satisfy Article 22 any attempts to negotiate must aim at resolving a dispute under the CERD. To meet the negotiation requirement set out in Article 22, Qatar's alleged attempts to negotiate must concern the specific dispute under the CERD that it has now submitted to the Court, and not just any dispute between Qatar and the UAE.

188. Even if there were attempts by Qatar to enter negotiations — *quod non* — they would have concerned only the wider dispute resulting from Qatar's violations of international law and the measures implemented by the UAE, together with other member States of the Gulf Cooperation Council, in response. However, as aptly noted by Judge Greenwood specifically in respect of the negotiation condition in Article 22 of the CERD:

> Where the two States are simultaneously engaged in a wider dispute, that means that it must be clear that there is an offer to negotiate regarding the Convention dispute and not simply about the wider dispute between the Parties. In a case such as the present, it is an essential feature of the applicant State's case regarding jurisdiction that the dispute which it seeks to bring before the Court can be separated from the wider dispute over which it is accepted that no jurisdiction exists. By the same logic, the offer of negotiation regarding the narrower dispute must be capable of being discerned amidst the exchanges about the wider

[320] *Id.*, p. 70, p. 133, para. 161.

[321] *Id. See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, p. 428, para. 83.

dispute. If that cannot be done, then an essential requirement of Article 22 has not been met.[322]

189. In its Application, Qatar relies on encounters, discussions, exchanges of views through media and multilateral meetings in support of its assertion that it has attempted genuinely to resolve a dispute under the CERD.[323] Not one of these so-called attempts at negotiation raises any concerns about violations of the CERD. To take certain examples of official statements of Qatar's representatives:

(a) In a statement before the Human Rights Council on 11 September 2017, the Minister of Foreign Affairs of Qatar complained that "the State of Qatar has been subjected to exceptional circumstances and challenges for more than three months as a result of an illegal siege imposed by a number of countries which clearly violate international human rights laws and conventions, in particular the Universal Declaration of Human Rights and the United Nations General Assembly resolution, the outcomes of the World Summit of 16 September 2005, the provisions of international law and the rules governing relations between States".[324] He further "reiterated Qatar's readiness to dialogue to end the Gulf crisis".[325] However, there was no mention of the CERD and no mention of discrimination, let alone racial discrimination. The Minister of Foreign Affairs did not even mention the UAE; rather he referred to the "siege countries".[326]

(b) In his address to the 72nd United Nations General Assembly on 19 September 2017, the Emir of Qatar referred at length to the

[322] *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*, Separate Opinion of Judge Greenwood, p. 70, p. 328, para. 13.

[323] *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, paras. 13-18.

[324] *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, Annex 13.

[325] *Id.*

[326] *Id.*

"continuing and unjust blockade".[327] He asserted that "this illegal blockade was not confined to economics and a breach of the World Trade Organization Agreement; it exceeded that to violate the human rights conventions with arbitrary measures that have caused social, economic and religious distress to thousands of citizens and residents of the Gulf Cooperation Council states by violating the basic human rights to work, education, freedom of movement and the right to dispose of private property".[328] He further accused the "blockading countries" of persecuting "their own citizens and residents" in violation of "the human rights conventions and agreements, which guarantee the human right to freedom of opinion and expression".[329] The Emir did not say anything about CERD or racial discrimination.

(c) Even when exercising its right to reply to the statement made by the UAE in the general debate of the 72nd General Assembly, Qatar's representative did not raise any alleged violation of the CERD. Rather, he referred to the "illegal and unjust siege that violates its sovereignty and national decision-making ability".[330]

(d) According to reports on a joint press conference held on 22 October 2017 with the United States Secretary of State, the Minister of Foreign Affairs of Qatar referred several times to the "crisis" affecting Qatar as a result of the "irresponsible actions of the siege countries".[331] He called on the "siege countries" to "shoulder their responsibility in terms of engaging in a positive and serious dialogue to put an end to this crisis that has no clear reasons so far neither to the State of Qatar nor to any of its allies".[332] Again, there was no mention of the CERD or racial discrimination.

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[327] *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, Annex 15, p. 2.

[328] *Id.*, p. 4.

[329] *Id.*

[330] United Nations, *Official Records of the General Assembly*, *Seventy-second session*, 18th plenary meeting, 22 September 2017, A/72/PV.18, p. 31.

[331] Ministry of Foreign Affairs of the State of Qatar, "Foreign Minister: Qatar Sees Any GCC Meeting Golden Opportunity for Civilized Dialogue", 22 October 2017, available at: https://www.mofa.gov.qa/en/all-mofa-news/details/2017/10/22/foreign-minister-qatar-sees-any-gcc-meeting-golden-opportunity-for-civilized-dialogue (**Annex 59**).

[332] *Id.*

(e) A statement of the Ministry of Foreign Affairs of Qatar on 24 October 2017 underlined that "Qatar has a strong belief in the fairness of its position in this crisis and its adherence to dialogue based on mutual respect, on the basis of its principles and values".[333] The statement does not mention the CERD and does not contain any allegations of racial discrimination.

(f) Addressing the Human Rights Council on 25 February 2018, the Minister of Foreign Affairs of Qatar raised the allegation of "the violations of human rights caused by the unjust blockade and the unilateral coercive measures".[334] The Minister did not mention the CERD or any racial discrimination. He did not even call for negotiations but urged the Human Rights Council "to shoulder [its] responsibilities and mandates in order to put an end to the human rights violations resulting from these unilateral coercive discriminatory measures, to hold those responsible accountable and to work towards compensating the victims".[335]

(g) According to news reports published on the website of Qatar's Ministry of Foreign Affairs, the Foreign Minister's spokesperson reaffirmed on 3 March 2018 Qatar's "continued welcome to the Kuwaiti mediation to solve the Gulf crisis, while also expressing her hope for a response and interaction of the siege countries with this mediation by taking serious steps to get out of the crisis".[336] But, again, there was no mention of the CERD violations or racial discrimination, and this only days before Qatar filed its communication with the CERD Committee under Article 11(1) CERD, on 8 March 2018.

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[333] Qatar Ministry of Foreign Affairs, "Qatar Highly Appreciates HH the Emir of Kuwait's Speech on Gulf Crisis", 24 October 2017, available at: https://www.mofa.gov.qa/en/all-mofa-news/details/2017/10/24/qatar-highly-appreciates-hh-the-emir-of-kuwait%27s-speech-on-gulf-crisis (**Annex 60**).

[334] *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, Annex 19.

[335] *Id.*

[336] Qatar Ministry of Foreign Affairs, "Foreign Ministry's Spokesperson: Qatar Continues to Welcome Kuwaiti Mediation, Hopes for Serious Steps by Siege Countries", 3 March 2018, available at: https://mofa.gov.qa/en/all-mofa-news/details/2018/03/03/foreign-ministry%27s-spokesperson-qatar-continues-to-welcome-kuwaiti-mediation-hopes-for-serious-steps-by-siege-countries (**Annex 61)**.

190. The record thus shows that, prior to 8 March 2018, Qatar did not allege violations of the CERD or accuse the UAE or other States in the region of racial discrimination. There was no dispute on any such subject. The references in the above communications to "the dispute", "the crisis", "the blockade", or "the siege" cannot but point to the wider — and real — dispute concerning Qatar's violations of international law and the reactions thereto implemented by the UAE and other States. Indeed, even Qatar's general and vague references to alleged human rights violations do not qualify as references to a dispute in respect of alleged violations of the CERD or the UAE's obligations in respect of the elimination of racial discrimination.[337]

191. Only one document relied upon by Qatar, from before March 2018, actually referenced the CERD: a letter to the UAE from six Special Rapporteurs concerning information received on "the adverse situation and the violations of human rights of Qatari migrants in the United Arab Emirates, as well as Emirati migrants in the State of Qatar as a result of the United Arab Emirates government's decision to suspend ties with the State of Qatar".[338] However, this document is not a communication from Qatar to the UAE. For this reason alone, it cannot constitute a relevant offer to negotiate for the purposes of Article 22 of the CERD.

192. Moreover, the six Special Rapporteurs did not call upon the UAE to enter into negotiations on alleged violations of obligations under the CERD. Rather, they merely "stress[ed] the obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)"[339] and asked

[337] *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*, p. 70, p. 118, para. 108.

[338] *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, Annex 11.

[339] *Id.*, p. 4.

for a "response on the initial steps taken" by the UAE government, as well as for further clarification in respect of the information provided to them.[340] The UAE duly replied by letter dated 18 September 2018, providing clarifications in response to the communication of the Special Rapporteurs.[341] This exchange between the UAE and the Special Rapporteurs constitutes nothing more than an exchange of information in response to (unproven) allegations of human rights violations. Such exchanges are provided for as standard in the Draft Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council.[342] They cannot establish the existence of a crystallised dispute on the interpretation or application of the CERD (or any other human rights instrument) between the UAE and Qatar, nor can they be considered negotiations or an offer to negotiate in relation to any dispute concerning the CERD. Importantly, the Special Rapporteurs specifically explained that they did "not wish to prejudge the accuracy of these allegations".[343]

193. None of the statements prior to 8 March 2018 that Qatar seeks to portray as proposals to negotiate refer to the CERD dispute that Qatar has now fabricated. These statements are far too broad for such a purpose. The UAE could not discern, on the basis of any of these statements, that Qatar was making an offer to negotiate regarding issues under the CERD, or even about racial discrimination in general terms, especially when Qatar was no more specific than alleging "a violation of the human rights conventions and agreements". In these

[340] *Id.*, p. 6.

[341] *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, Annex 14.

[342] Human Rights Council, Resolution 5/2, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, 18 June 2007.

[343] *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, Annex 11, p. 3.

circumstances, Qatar cannot rely on the communications that took place prior to 8 March 2018 to show that it made genuine attempts to negotiate or that the UAE was unwilling to enter into negotiations on the dispute Qatar now seeks to refer to the Court.[344]

2. Even After 8 March 2018, Qatar Still Did Not Engage in Meaningful Attempts to Settle the Dispute Either Through Negotiation or Through the Procedures Expressly Provided for under the CERD

194. Even after Qatar, in early March 2018, invented a claim of alleged breaches of the CERD by the UAE, it still never engaged in meaningful attempts to settle that artificial dispute either by negotiation or through the procedures expressly provided for under the CERD.

195. Rather, the record before the Court shows that Qatar's real intention was to abuse the process for political reasons. As part of this strategy, Qatar sought to bring its case before the Court as quickly as possible. Qatar was well aware that this required the fulfilment of certain preconditions under Article 22 of the CERD, and thus took steps to seek to rush through them. However, as detailed below, neither Qatar's initiation of the procedure under Article 11(1) of the CERD on 8 March 2018, nor the supposed "invitation" to negotiate in Qatar's 25 April 2018 letter, can satisfy the preconditions under Article 22 of the CERD.

196. Qatar's misuse of, and attempt to side-step Article 22 of the CERD, is evidenced by the extremely condensed and overlapping timeframe within which Qatar sought to hurry through the preconditions of Article 22:

[344] *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*, p. 70, p. 135, paras. 167-168.

(a) on 8 March 2018, Qatar submitted its Communication to the CERD Committee in accordance with Article 11(1) CERD; the communication was examined by the CERD Committee at its next session starting on 23 April 2018;

(b) on 25 April 2018, in the middle of the session of the CERD Committee and before the CERD Committee had taken a decision in respect of the transmission of the communication to the UAE, Qatar sent the UAE a letter demanding negotiations within two weeks in relation to CERD; the UAE received this letter on 1 May 2018;

(c) on 4 May 2018, during its 2633rd meeting, the CERD Committee decided to transmit Qatar's Communication to the UAE; the UAE received the communication on 7 May 2018; in accordance with Article 11(1) CERD, the UAE had until 7 August 2018 to submit its written explanation (which it duly did by that date); and

(d) on 11 June 2018, Qatar filed its Application instituting proceedings before the Court.

197. The highly unorthodox sequence and timing of these events shows that Qatar did not intend to engage meaningfully with the procedure under Article 11 of the CERD. Indeed, the way in which Qatar filed its Application with the Court prior to the CERD Committee's consideration of Qatar's initial Communication suggests that Qatar placed no store at all in the Article 11(1) procedure. Qatar did not even deem it necessary to wait for the CERD Committee to consider, and to take any action in respect of, Qatar's own initial Communication.[345]

198. The fact just illustrated, that Qatar did not take seriously the procedures under the CERD, justified the assessment — set forth in UAE Submissions to CERD in 2018[346] and 2019[347] as well as in its Request for the

[345] *See* para. 196(c), *supra*.

[346] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Supplemental Response of the UAE, 29 November 2018, paras. 72-79 (**Annex 16**).

[347] *Id*., UAE's Comments on Qatar's Response on Issues of Jurisdiction and Admissibility of 19 March 2019, paras. 159-167 (**Annex 19)**.

indication of provisional measures of 22 March 2019 —[348] that the abrupt filing of its Application to the Court entailed the abandonment by Qatar of the CERD proceedings.

199. Qatar later realized that it had to appear as pursuing such proceedings in order to fulfil the preconditions of Article 22. Thus, with a *Note Verbale* dated 29 October 2018 Qatar informed the CERD Committee that:

> "The State of Qatar elects to exercise its right under Article 11(2) to refer the matter again to the Committee."[349]

200. Qatar's "re-submission" of the matter to the Committee with its *Note Verbale* of 29 October 2018 is, however, defective. Qatar assumes that under Article 11(2) a State has the right to re-submit a matter to the Committee simply because it is in compliance with the six months time limit and just by stating that the matter has not been adjusted to its satisfaction.[350]

201. Qatar's re-submission completely ignores the reference contained in Article 11(2) to bilateral negotiations or other procedures. This reference, as all treaty provisions, must, however, have a meaning, an *effet utile*. If the reference simply meant, as Qatar assumes, that, within the six-month time-limit in fact no adjustment has been reached by negotiation or other procedures, it would add nothing to the simple six-months requirement. A proactive engagement in seeking negotiations is, as a minimum, necessary.

202. In the present case, within the six month time-limit set out in Article 11(2), Qatar has made no attempt to engage in bilateral negotiations or

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[348] *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 to Preserve the United Arab Emirates' Procedural Rights and to Prevent Qatar from Aggravating or Extending the Dispute, Submitted by the United Arab Emirates, 22 March 2019, para. 35.

[349] *Note Verbale*, from Qatar to the CERD Committee, 29 October 2018, p. 3 (**Annex 14)**.

[350] *Id*.

other procedures. It has simply assumed, referring to the UAE Response submitted to the CERD Committee on 7 August 2018, "that the United Arab Emirates is unwilling to engage constructively with the State of Qatar to settle the matter amicably".[351] This does not absolve Qatar from the obligation of engaging in bilateral negotiations. 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.

203. As detailed below, Qatar failed to pursue as far as possible the procedures expressly provided for in the CERD; and the sequence of events also reveals that the supposed "invitation to negotiate" in Qatar's letter of 25 April 2018 was not a genuine attempt to enter into negotiations and to resolve the dispute. Accordingly, on the date of the filing of its Application, *i.e.*, 11 June 2018, Qatar had not satisfied either of the preconditions in Article 22 of the CERD.

3. Qatar Has Failed to Pursue As Far As Possible the Procedures Expressly Provided for in the CERD

204. On 8 March 2018, Qatar submitted a communication "regarding the [UAE] to the [CERD Committee] pursuant to Article 11 of [CERD], which entered into force on 4 January 1969".[352] It did so "invok[ing] the authority of the Committee to receive and transmit this Communication to UAE based on UAE's failure to give effect to the provisions of the CERD".[353]

205. In its Communication, Qatar made the same assertions as subsequently made in its Application to the Court. In particular, Qatar has

[351] *Id.*, p. 2.

[352] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, para. 1 (**Annex 12**).

[353] *Id.*, para. 2.

alleged, both in its Communication and its Application, that the "UAE enacted and implemented discriminatory policies directed at Qatari citizens and companies on the sole basis of their Qatari nationality in violation of the CERD".[354] Qatar also asserts, in both its Communication to the CERD Committee and its Application to the Court, that the UAE has contravened the prohibition of collective expulsion,[355] has incited and failed to condemn racial hatred and prejudice,[356] and has interfered with protected rights in a discriminatory manner, including the right to marriage,[357] the right to freedom of opinion,[358] the right to public health and medical care,[359] the right to education,[360] the right to property

[354] *Id.*, paras. 3, 57. *See also 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, paras. 3, 58.

[355] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 64-72 (**Annex 12**); *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. 59.

[356] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 111-119 (**Annex 12**); *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, paras. 60-62.

[357] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 75-82 (**Annex 12**); *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, paras. 31-35.

[358] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 83-91 (**Annex 12**); *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, paras. 36-39.

[359] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 92-93 (**Annex 12**); *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, paras. 40-41.

[360] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 94-96 (**Annex 12**); *Application of the International Convention on the Elimination of*

and to work,[361] and the right to equal treatment before tribunals.[362] As explained above, none of these allegations is true in fact or in law.[363]

206. Based on these allegations, Qatar asserted in its Communication to the CERD Committee:

> After nearly ten months of enduring the Coercive Measures, and with no end in sight, Qatar is now compelled to seek the assistance and intervention of this Committee. While Qatar has taken steps towards mitigating the impact of UAE's discriminatory conduct, the violations of the human rights of Qatari citizenry continue, and Qatar must therefore call upon this Committee for assistance with respect to UAE abiding by its international obligations to Qatar, and, indeed, to its own citizens.[364]

207. Under the heading prayer for relief, Qatar wrote:

> On the basis of the foregoing and consistent with Article 11(1) of the Convention, Qatar respectfully requests that this Committee transmit this Communication to UAE for UAE to (a) respond within the three month period set forth under that Article, and (b) take all necessary steps to end the Coercive Measures, which are in violation of international law and its obligations under the CERD.[365]

All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Application Instituting Proceedings, 11 June 2018, para. 42.

[361] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 97-107 (**Annex 12**); *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, paras. 43-45.

[362] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, paras. 108-110 (**Annex 12**); *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.

[363] *See* paras. 30-52, *supra*.

[364] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, para. 8 (**Annex 12**).

[365] *Id.*, para. 123.

208. Qatar thus formally submitted its allegation that the UAE is not giving effect to the provisions of the CERD to the attention of the CERD Committee. It actively chose to initiate the prescribed procedures concerning the settlement of disputes or complaints expressly provided for in the CERD. In so doing, Qatar referred in clear terms to Article 11(1) CERD and to the UAE's obligation to submit written explanations or statements clarifying the matter to the CERD Committee within three months.

209. The CERD Committee decided at its 2633rd meeting, on 4 May 2018, to transmit the communication to the UAE. The decision of the CERD Committee also confirmed that it was "[a]cting under Article 11 of [CERD]". The CERD Committee "invite[d] the United Arab Emirates to submit to the Committee, within three months, 'written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State', as provided for by Article 11, para 1, of [CERD]".[366]

210. This procedural decision of the CERD Committee and Qatar's Communication were, in turn, transmitted to the UAE by the Secretary-General of the United Nations (High Commissioner for Human Rights) on 7 May 2018.[367]

211. However, despite Qatar's recognition and formal instigation of the procedures under Articles 11-13 of the CERD, and its express request for the CERD Committee's assistance and intervention, at the time it submitted the present dispute to this Court, Qatar had failed to pursue these procedures. Further, it appears that Qatar may never have intended to do so, instead hoping simply to

[366] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, 8 March 2018, transmitted through Letter from the Secretary-General of the United Nations (High Commissioner for Human Rights) to the Permanent Representative of the United Arab Emirates to the United Nations Office at Geneva, 7 May 2018 (**Annex 12**).

[367] *Id.*

comply "on paper" with the Article 22 preconditions without properly engaging with the CERD procedures.

212. There cannot be any question that, by the time it submitted its Application to the Court, Qatar had not pursued the CERD procedures as far as possible; indeed, Qatar had not in any meaningful way even attempted to settle the dispute within the framework of the procedures expressly provided for in the CERD. When Qatar filed its Application to the Court, the procedure under Article 11(1) CERD had only just started and the UAE had the right, and the obligation, to consider the Communication carefully and to respond within three months, *i.e.*, by 7 August 2018. Therefore, it cannot be said that Qatar's Application relates to a dispute "which is not settled by . . . the procedures expressly provided for in this Convention".[368]

213. Article 22 of the Convention does not permit Qatar to commence a formal dispute resolution procedure — specifically provided for in the CERD to address allegations of failure to fulfil CERD obligations — only immediately to disregard it by prematurely submitting the same dispute to the Court. Not only did Qatar consent to the procedures specifically provided for in Articles 11-13 of the CERD for the resolution of disputes, it also commenced them by its own choice. It was obliged to pursue them in good faith and as far as possible.

214. In this respect, the facilitated negotiation procedures established under Articles 11-13 are no different to direct negotiation: States must conduct themselves so that the "negotiations are meaningful".[369] As is frequently recalled by the Court, an obligation to negotiate entails an obligation:

> not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements [even if] an

[368] CERD, Article 22.

[369] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, p. 47, para. 85(a).

> obligation to negotiate does not imply an obligation to reach agreement . . .[370]

215. The same is necessarily true of the CERD procedures to facilitate a consensual resolution. In respect of a comparable dispute resolution mechanism, the Court explained in the *Pulp Mills* case:

> there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute [of the River Uruguay] if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.[371]

216. For its part, the UAE has engaged in the CERD procedures fully and in good faith. The UAE complied with its obligation to submit written explanations. These explanations were transmitted to the CERD Committee in a *Response* on 7 August 2018.[372] After Qatar's re-submission of the matter to the CERD Committee with the *Note Verbale* of 29 October 2018,[373] the UAE has further responded to Qatar's arguments and raised jurisdictional and admissibility objections. This it did with a *Submission* dated 7 November 2018,[374] with a

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[370] *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, p. 48, para. 87; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, p. 68, paras. 147, 150; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011*, p. 644, p. 685, para. 132; *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. 70, p. 133, para. 158.

[371] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, p. 67, para. 147.

[372] *The State of Qatar v. United Arab Emirates*, 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, 7 August 2018 (**Annex 13**).

[373] *Note Verbale* from Qatar to the CERD Committee, 29 October 2018, p. 3 (**Annex 14)**.

[374] Letter of the Permanent Mission of the United Arab Emirates to the United Nations Office and Other International Organisations to the State of Qatar, 7 November 2018 (**Annex 15**).

Supplemental Response dated 29 November 2018[375] and a *Supplemental Response on Issues of Jurisdiction and Admissibility* dated 14 January 2019.[376] The UAE most recently replied to the *Response of the State of Qatar* dated 14 February 2019 with *Comments on Qatar's Response on Issues of Jurisdiction and Admissibility* dated 19 March 2019.[377]

217. Qatar's invalid re-submission of the issue to the CERD Committee in October 2018 while continuing to keep open the procedure before this Court is no remedy for Qatar not pursuing the procedures prescribed by the CERD Convention in conformity with Article 22. It has been shown above[378] that the requirement of "bilateral negotiations" set out in Article 11(2) has not been complied with.

218. Even if Qatar were to be considered *(quod non)* as having genuinely engaged in complying with the precondition of Article 22 that the dispute has not been settled by the procedures expressly provided for in the Convention, the completion of these procedures must be reached before the Court may be seized.

219. In line with this, because Qatar continued to pursue parallel proceedings, the UAE argued that the CERD Committee should declare Qatar´s case inadmissible.[379] On 22 March 2019 the UAE submitted to this Court a

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[375] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Supplemental Response of the UAE, 29 November 2018 (**Annex 16**).

[376] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Supplemental Response of the UAE on issues of Jurisdiction and Admissibility, 14 January 2019 (**Annex 17**).

[377] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, UAE's Comments on Qatar's Response on Issues of Jurisdiction and Admissibility, 19 March 2019 (**Annex 19**).

[378] *See* paras. 199-202, *supra*.

[379] *See, e.g., The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, UAE's Comments on Qatar's Response on Issues of Jurisdiction and Admissibility, 19 March 2019, paras. 168-190 (**Annex 19**).

request for indication of provisional measures which includes the request to "order that . . . Qatar immediately withdraw" its Communication submitted to the CERD Committee on 8 March 2018.[380] This shows that the UAE is convinced that the proceedings before the CERD Committee are defective and that their running in parallel with the proceedings before the Court leads to a situation of *lis pendens* that can and should be avoided. The UAE has therefore diligently sought to prevent the prejudice that is caused to it by Qatar's abuse of process deriving from its decision to pursue the same relief from two dispute settlement bodies at the same time, creating a situation of *lis pendens*.

220. These initiatives by the UAE are consistent and mutually reinforcing. Both the UAE's request for indication of provisional measures and the present preliminary objections are based on the interpretation of the compromissory clause of Article 22 on which Qatar alleges that the Court's jurisdiction is based. In any case, it is a fact that the Committee — and the Court — have not yet pronounced on these requests of the UAE and that the CERD Committee proceedings are not concluded. In this situation, Qatar cannot claim that the precondition that the dispute has not been settled by the procedures expressly set out in the Convention has been satisfied. Nor can it claim, as will be demonstrated below, that the precondition of negotiation has been complied with.

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[380] *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 to Preserve the United Arab Emirates' Procedural Rights and to Prevent Qatar from Aggravating or Extending the Dispute, Submitted by the United Arab Emirates, 22 March 2019, para. 74(i). The UAE has also requested that Qatar "desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE" and "stop its national bodies and its State-owned, controlled and funded media outlets from aggravating and extending the dispute and making it more difficult to resolve by disseminating false accusations regarding the UAE and the issues in dispute before the Court." *Id*., para. 74(ii) and (iii). The last provisional measure requested by the UAE is premised on the fact that Qatar continues to disseminate false accusations regarding the UAE's compliance with the Order on Provisional Measures. *See, e.g*., "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 six months following its adoption", National Human Rights Committee, 23 January 2019 (**Annex 156**).

221. To assert that it made a genuine attempt to enter into negotiations in respect of the alleged violations of the CERD, Qatar relies on its letter dated 25 April 2018,[381] received by the UAE on 1 May 2018. In its Application, Qatar alleges that:

> Most recently, on 1 May 2018, in light of the urgency presented by the human rights crisis caused by the UAE's discriminatory conduct, His Excellency Sultan Ben Saed Al-Marikhi, the Qatari Minister of State for Foreign Affairs, requested that the UAE Minister of State for Foreign Affairs, His Excellency Anwar Gargash, agree to negotiate to address the ongoing violations of the CERD. The request asked for a response within two weeks. The UAE did not respond at all. Six weeks later, the UAE still has not responded.[382]

222. It is correct that the letter of 25 April 2018 — which Qatar now refers to as the "Request for Negotiation" — addressed alleged "coercive measures adopted by the State of the United Arab Emirates on June 5, 2017".[383] Qatar asserted that "such measures violate the obligations of the UAE under the CERD and its underlying moral principles and the internationally recognized customary principle of nondiscrimination on arbitrary grounds".[384]

223. It is also correct that, in the 25 April 2018 letter, Qatar made reference to negotiations, writing:

> in the event that these violations are not eliminated and given Qatar's concern to protect the interests of Qatari nationals and defend their rights, it is necessary to enter into negotiations in order to resolve these violations and the effects thereof within no more than two weeks from the date of receiving this letter, in accordance

[381] *See 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, Annex 21.

[382] *Id.*, para. 18.

[383] *Id.*, Annex 21.

[384] *Id.*

> with the principles of international law and the principles governing relationships between countries.[385]

224. However, given the particular circumstances surrounding this correspondence, it cannot be considered a genuine, good faith attempt to enter into negotiations. To the contrary, careful scrutiny of the context around the 25 April 2018 letter reveals it to be merely another example of Qatar seeking to "tick the boxes" of Article 22 of the CERD while rushing to seize the Court, without meaningfully engaging with the jurisdictional preconditions prescribed by Article 22.

225. As explained above, the letter was sent while the CERD Committee was still considering Qatar's Communication under Article 11(1) of the Convention and had not even transmitted it to the UAE.[386] Qatar had started a specific procedure, agreed upon by the States Parties to CERD, expressly in order to address alleged violations of the CERD. There was thus no reason whatsoever for Qatar, having formally called for the assistance of the CERD Committee,[387] almost instantly then to seek to bypass the Article 11(1) procedure — and, instead, unilaterally to impose its own arbitrary (and impractical) terms as to how and by when negotiations between Qatar and the UAE should be conducted.

226. Qatar, however, needed to be in a position to claim that it had made an attempt to negotiate, prior to its attempt to seize the Court. Hence, it sent the 25 April 2018 letter, purportedly in fulfilment of the negotiation requirement in Article 22 of the CERD. Notably, however, the letter makes no reference to the fact that Qatar had just initiated the Article 11(1) CERD procedure of which the UAE was not yet aware. Thus, once it is properly placed within the context established by the evidence on the record, Qatar's 25 April 2018 letter is exposed

[385] *Id*.

[386] *See* para. 196, *supra*.

[387] *See* para. 206, *supra*.

as nothing more than a hastily conceived and deliberately misleading attempt to satisfy one of the Article 22 preconditions. It cannot reasonably be considered a genuine attempt to find an amicable settlement to a dispute which was not yet known to the UAE.

227. The above circumstances make it clear that Qatar's supposed "offer" to negotiate, effectively in the form of an ultimatum, was neither accepted nor refused by the UAE. Indeed, the relevant sequence of events as established by the evidence before the Court is, once again, instructive. It shows that the UAE first received the purported "offer to negotiate" on 1 May 2018. Less than a week later — and before the expiration of Qatar's two-week ultimatum — the UAE received, through the Secretary-General, Qatar's Communication to the CERD Committee and the decision of the CERD Committee recalling the three-month time-limit to respond to the Communication.[388] There was thus no reason for the UAE not to believe that the procedure of Article 11(1) CERD constituted, and was considered by Qatar to constitute, the framework in which the States Parties would resolve their dispute at least at that time. As shown above, the UAE faithfully and meaningfully followed the CERD procedure, submitting its written observations to the CERD Committee on 7 August 2018.

228. In light of the above, Qatar cannot legitimately rely on its supposed "offer to negotiate" in isolation; that would be to ignore the true context to the letter, as established by the evidence before the Court, which reveals it to be no more than a self-serving attempt to fulfil on paper — but without genuine intent — the negotiation precondition of Article 22 of the CERD.

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229. Qatar has not pursued as far as possible a consensual settlement of the artificial dispute with which it has seized the Court, either through direct

[388] *See* paras. 207 and 209, *supra*.

negotiation or through the procedures expressly provided for under the CERD. The dispute submitted by Qatar to the Court in its Application thus fails to meet the requirement of Article 22 that the dispute be one "which is not settled by negotiation or by the procedures expressly provided for in this Convention". The Court therefore has no jurisdiction over Qatar's Application.

V. THIRD PRELIMINARY OBJECTION: QATAR'S CLAIMS ARE ABUSIVE AND MUST BE DEEMED INADMISSIBLE

230. Qatar has cynically initiated parallel proceedings before the Court in respect of the same dispute whilst the Article 11 procedure was pending before the CERD Committee. Qatar's conduct undermines the authority of the Court and the integrity of the Court's procedures and amounts to an abuse of process. This renders its claims before the Court in these proceedings inadmissible.

231. The Court has recognised that an abuse of process can constitute a ground of inadmissibility in numerous cases.[389] In *Immunities and Criminal Proceedings*, the Court recognised that "an abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of [the] proceedings".[390] When the initiation of a legal proceeding is founded on an abuse of rights, international tribunals have declared the claims in those proceedings inadmissible.[391]

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[389] *See, e.g., Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, pp. 34-35, paras. 113-115; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, 6 June 2018 General List No. 163*, pp. 40-43; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, pp. 12, 37-8, para. 44; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, p. 267, para. 38.

[390] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, 6 June 2018 General List No. 163*, p. 42, para. 150.

[391] *See, e.g., Churchill Mining PLC & Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 & ARB/12/40, Award of 6 December 2016, para. 528 ("[T]he general principle of good faith and *the prohibition of abuse of process* entail that the claims before this Tribunal

232. According to Kolb, an abuse of process involves the use of the Court's procedures for a purpose that is "alien to those for which the procedural rights were established"[392]. This definition encompasses purposes that are "fraudulent, procrastinatory or frivolous, for the purpose of causing harm or *obtaining an illegitimate advantage or for the purpose of reducing or removing the effectiveness of some other available process*, or for the purpose of pure propaganda."[393] Abuse of process is closely related to the principle of good faith.[394] In fact, the principle that rights shall not be abused is a corollary of the obligation to act in good faith, widely recognized by international tribunals.[395] The specific actions taken by Qatar in this case provide ample evidence that Qatar has illegitimately sought to make use of the Court's procedures in the present case.

233. The sequence of procedural events in the present case leads to the inescapable conclusion that Qatar has sought superficially to "tick the boxes" in order to be able to claim that it had met the procedural preconditions laid down in Article 22 required to bring the purported dispute under the CERD before the Court. This is illustrated by the following actions taken by Qatar before the CERD Committee and this Court:

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cannot benefit from investment protection under the Treaties and are, consequently, deemed *inadmissible*.") (emphasis added); *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paras. 585-588; *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, paras. 174-180; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 106-113, 143-145.

[392] R. Kolb, 'General Principles of Procedural Law' in A Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 831, para. 49.

[393] *Id.* (emphasis added).

[394] *Id.*, para. 48 ("[T]he principle [of good faith] forms the basis of the more specific rule on the prohibition of abuse of procedure.").

[395] *See, e.g., Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, 1926, P.C.I.J., Series A, No. 7, May 25th, p. 30*; *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B., No. 46*, June 7th, p. 5, p. 167.

(a) Qatar filed the CERD Communication on 8 March 2018. The timing of this filing meant that the Communication was received by the CERD Committee in between its 94th and its 95th sessions.[396] In accordance with its Rules of Procedure, the CERD Committee needed to examine the communication at a private session first or, alternatively, if a communication was filed when the CERD Committee was not in session, its chairman needed to consult all of the members of the Committee before transmitting the communication to the UAE.[397] Qatar's CERD Communication was eventually transmitted to the UAE on 7 May 2018, at the end of the 95th session of the CERD Committee.[398] As provided for in Article 11(1) of the CERD, the UAE was given until 7 August 2018 to submit its written explanations to the CERD Committee.

(b) On 25 April 2018, prior to the CERD Committee having transmitted Qatar's CERD Communication to the UAE, Qatar sent a letter to the UAE seeking negotiations in relation to the same alleged dispute under the CERD and demanding a response within two weeks.[399]

(c) Qatar filed its Application instituting proceedings and its Request for Provisional Measures before this Court on 11 June 2018. Notably, this was almost two months before the observations of the UAE before the CERD Committee under Article 11(2) were due to be filed (on 7 August 2018). The natural inference behind the rushed filings is that Qatar had no real intention of pursuing the CERD Committee proceedings to their end, and only sought to demonstrate compliance in form, but not in substance, with the procedural preconditions of Article 22 CERD.

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[396] The 95th Session of the CERD Committee ran from 23 April 2018 to 11 May 2018. United Nations Human Rights, Office of the High Commissioner, CERD - International Convention on the Elimination of All Forms of Racial Discrimination, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1195&Lang=en.

[397] Rules of Procedure of the Committee on the Elimination of Racial Discrimination, CERD/C/35/Rev.3, Rule 69.

[398] *The State of Qatar v. United Arab Emirates*, The Committee on the Elimination of Racial Discrimination, Communication submitted by Qatar pursuant to Article 11 of the CERD, *Note Verbale* from the Secretary General of the United Nations (High Commissioner for Human Rights) to the UAE, dated 7 May 2018 (**Annex 12**).

[399] *See* para. 196, *supra*.

(d) On 27-29 June 2018, the Court held hearings on the provisional measures requested by Qatar and issued the Order on Provisional Measures on 23 July 2018, indicating certain provisional measures directed to the UAE, but declining to grant any of the nine specific provisional measures requested by Qatar. Thereafter, the Court by an Order of 25 July 2018, fixed the time-limits for the parties' respective pleadings as 25 April 2019 for Qatar's Memorial and 27 January 2020 for the UAE's Counter-Memorial.

(e) On 29 October 2018, whilst the present proceedings before the Court were still pending, Qatar strategically re-initiated the CERD Committee proceedings by asking the CERD Committee to take up the dispute again.

234. Qatar not only prematurely seized the Court by its Application whilst the conciliation procedure under CERD was still in process, but it has also continued to pursue the same relief from both the CERD Committee and the Court. As a consequence, Qatar has unnecessarily escalated a dispute which, if given the chance, could have been resolved through other means. It has done so in order to procure for itself an "illegitimate advantage". By spreading its claim simultaneously across two bodies, Qatar gains the ability to attempt to leverage any success in one forum to its advantage in the other. Compelling a response from the UAE in the proceedings before the CERD Committee also resulted in Qatar gaining the benefit of advance notice of the arguments likely to be raised by the UAE before the Court, giving rise to unfairness in these proceedings.

235. By attempting to circumvent the role of the CERD Committee in resolving the dispute, Qatar's actions clearly have also had the effect of "reducing or removing the effectiveness of some other available process".[400] Qatar has created a significant risk that the CERD Committee proceeding and the case before this Court reach contradictory legal outcomes.

[400] R. Kolb, 'General Principles of Procedural Law' in A Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 831, para. 49.

236. As shown in *Border and Transborder Armed Actions*, the Court takes seriously the prejudicial impact that an ongoing parallel proceeding might have on admissibility. In that case, the Court ultimately rejected Honduras's objection but only did so on the grounds that the regional dispute resolution proceedings (the Contadora Process) had, by the date that Nicaragua initiated proceedings, properly reached their conclusion.[401] The limited grounds for this finding beg the question of whether a different conclusion would have been reached had the Contadora Process been ongoing.

237. Unlike the regional Contadora Process, parallel proceedings of the CERD Committee and of the Court would entail the risk of a clash between these two international institutions in violation of the linear and hierarchical dispute resolution process of Article 22 of the CERD. Qatar's actions generate institutional discordance between two respectable international bodies, and place the unity and coherence of international law as a whole under significant threat. The potential impact of the abusive action is thus therefore greater in this case, and the grounds of inadmissibility in turn more compelling.

238. This case has all the hallmarks of an abuse of process. The Court accordingly should find that Qatar´s claims are inadmissible.

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[401] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p.69, p. 104, para. 94 ("The Court considers that…the events of June/July 1986 constituted a ´conclusion´ of the initial procedure both for purposes of Article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.").

VI. SUBMISSION

239. On the basis of each of the three independent preliminary objections explained above, the United Arab Emirates respectfully requests the Court to adjudge and declare that the Court lacks jurisdiction over Qatar's Application of 11 June 2018 and that the Application is inadmissible.

240. The United Arab Emirates reserves the right to amend and supplement this submission in accordance with the provisions of the Statute and the Rules of Court. The United Arab Emirates also reserves the right to submit further objections to the jurisdiction of the Court and to the admissibility of Qatar's claims if the case were to proceed to any subsequent phase.

The Hague, 29 April 2019

HE Dr Hissa Abdullah
Ahmed Al-Otaiba

Agent of the United Arab Emirates, Ambassador of the United Arab Emirates to the Kingdom of the Netherlands

CERTIFICATION

I hereby certify that the documents reproduced as annexes are true copies of the originals and that translations into either of the Court's official languages are accurate.

The Hague, 29 April 2019

HE Dr Hissa Abdullah
Ahmed Al-Otaiba

Agent of the United Arab Emirates, Ambassador of the United Arab Emirates to the Kingdom of the Netherlands

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