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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2019

Public sitting

held on Wednesday 8 May 2019, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar *v.* United Arab Emirates)**

VERBATIM RECORD

ANNÉE 2019

Audience publique

tenue le mercredi 8 mai 2019, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***en l'affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis)**

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judges *ad hoc*	Cot
		Daudet
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
MM. Gaja
Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges
MM. Cot
Daudet, juges *ad hoc*

M. Couvreur, greffier

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Ms Catherine Amirfar, Debevoise & Plimpton LLP, member of the Bars of the United States Supreme Court and New York,

Mr. Lawrence H. Martin, Foley Hoag LLP, member of the Bars of the District of Columbia and Massachusetts,

Mr. Pierre Klein, Professor of International Law, Université libre de Bruxelles,

Mr. Donald Francis Donovan, Debevoise & Plimpton LLP, member of the Bars of the United States Supreme Court and New York,

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Mr. Jassim Al-Kuwari, Ministry of Foreign Affairs,

Mr. Nasser Al-Hamad, Ministry of Foreign Affairs,

Mr. Khalid Abdulaziz Al-Khulaifi, Ministry of Foreign Affairs,

Ms Ream Ahmad Al-Thani, Ministry of Foreign Affairs,

Ms Hissa Sultan Aldosari, Ministry of Foreign Affairs,

Ms Hanadi Al Shafei, Ministry of Foreign Affairs,

Mr. Ali Al-Hababi, Embassy of the State of Qatar in the Netherlands,

Mr. Rashed Al-Naemi, Embassy of the State of Qatar in the Netherlands,

Mr. Omar Boujnane, Embassy of the State of Qatar in the Netherlands,

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The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the first round of oral observations of the State of Qatar on the Request for the indication of provisional measures submitted by the United Arab Emirates. I now call on Dr. Mohammed Abdulaziz Al-Khulaifi, Agent of the State of Qatar. You have the floor.

Mr. AL-KHULAIFI:

I. INTRODUCTORY STATEMENT

1. Mr. President, Honourable Members of the Court, it is a great honour to appear before this Court as the Agent of the State of Qatar.

2. When I stood before this Honourable Court last year, my country was seeking provisional measures to alleviate the suffering of Qataris affected by the UAE's discriminatory measures.

3. Qatar recognizes that the Court did not take lightly the step of indicating provisional measures on 23 July 2018. Qatar is well aware of the exceptional nature of the provisional relief granted by the Court, and Qatar itself brought its request before the Court based on the *urgent* need to protect the fundamental rights of Qataris, including families forced to live apart, students deprived of the opportunity to complete their education, and others unable to access their homes, businesses and properties in the UAE. Qatar had to seek the provisional measures from the Court to prevent the fundamental human rights of Qataris from being irreparably prejudiced.

4. In contrast to Qatar's approach, the UAE now comes before the Court requesting provisional measures that are inconsistent, incoherent, and without a shred of doubt, unjustified. The UAE asks this Court to take the exceptional steps of indicating provisional measures without answering the most basic question: how does the UAE stand to be irreparably harmed unless the Court acts now? The answer is that the UAE cannot show the requisite urgency or harm because it does not exist.

5. To start, the UAE seeks provisional measures based in part on the false assertion that *Qatar* has aggravated this dispute. Mr. President, Honourable Members of the Court, let me be clear on this point: my country fully appreciates its legal obligation to comply with the Provisional Measures Order of 23 July 2018, and it has done nothing to aggravate or extend this dispute it brought before the Court.

6. To the contrary, following the provisional measures hearing, in August 2018, Qatar sent a letter to the UAE's Minister of State for Foreign Affairs, suggesting the establishment of a joint committee to oversee the implementation of the Provisional Measures Order[1]. The UAE did not even reply to Qatar. Instead, it sent a letter to the Court accusing Qatar of seeking "to involve itself in the UAE's administration of its laws and rules", and dismissing Qatar's good faith suggestion as "an improper effort to infringe on the UAE's sovereignty and internal affairs"[2]. If anything, it is thus the UAE, and not Qatar, which has aggravated and extended this dispute.

7. Indeed, the UAE either has refused or ignored each and every attempt by Qatar to amicably settle this dispute. For example, Qatar attempted to negotiate with the UAE in April 2018, but as the Court noted in the Provisional Measures Order, "the UAE *did not respond*"[3]. And the UAE's non-co-operation extends to the international bodies seeking to find a way to resolve this crisis. When six United Nations Special Rapporteurs wrote to the UAE in August 2017, urging that measures be taken to "halt the alleged violations" of Qataris' human rights[4], the UAE refused to meaningfully address those violations. Instead, it stated that it was "highly displeased" that the Special Rapporteurs' communication was issued as an urgent appeal[5]. Likewise, when the Office of the United Nations High Commissioner for Human Rights dispatched a Technical Mission to Qatar in November 2017 and offered to conduct a similar mission in the UAE, the UAE refused to engage. It later criticized the Technical Mission as well as the conclusions of the High Commissioner's final report[6].

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[1] Annex 20, Letter from Soltan bin Saad Al-Muraikhi, Minister of State for Foreign Affairs of the State of Qatar, to H.E. Mr. Anwar Gargash, Minister of State for Foreign Affairs of the United Arab Emirates, 16 Aug. 2018 (certified English translation, with unofficial French translation).

[2] Annex 24, Letter from Saeed Ali Yousef Alnowais, Agent of the United Arab Emirates, to H.E. Mr. Philippe Couvreur, Registrar of the International Court of Justice, 12 Sept. 2018, p. 2.

[3] *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*, I.C.J. Reports 2018 (II), p. 420, para. 38; emphasis added.

[4] Annex 14, Joint Communication from Special Procedures Mandate Holders of the Human Rights Council to the United Arab Emirates, 18 Aug. 2017 (hereinafter "Joint Communication of Special Procedures Mandate Holders"), p. 7.

[5] Annex 15, The Permanent Mission of the United Arab Emirates to the United Nations Office and Other International Organizations at Geneva, reply to the Joint Communication from the Special Procedures Mandate Holders of the Human Rights Council, 18 Sept. 2017, pp. 2-3.

[6] Annex 16, "Joint Statement issued by four boycotting States denouncing report of UNHCHR's technical mission on its visit to Qatar", *Saudi Press Agency*, 30 Jan. 2018, https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1715223.

8. Incredibly, what the UAE is suggesting now is that Qatar has aggravated this dispute by seeking to resolve it through a non-binding and peaceful conciliation process under the CERD Committee — a process *expressly provided for* in the Convention itself, as a means to reach "an amicable solution"[7] between States parties. On that basis, the UAE asks the Court to order that "Qatar immediately withdraw its Communication submitted to the CERD Committee" and "take all necessary measures to terminate consideration thereof by the CERD Committee"[8]. Mr. President, Honourable Members of the Court, there is no logic to the UAE's argument at all.

9. Indeed, the UAE's position before the Court with respect to the CERD Committee can only be described as highly inconsistent, at once embracing and dismissive, depending on which suits the objective of the moment. Initially before the Court, the UAE argued that the ICJ should dismiss Qatar's Application in favour of the CERD Committee. The Court will recall that during the provisional measures hearing last year, the UAE expressly acknowledged that the CERD Committee is the "principal custodian of the Convention"[9]. It even argued that "it is compulsory to refer to the Committee in all events" and specifically stated that it "seems perfectly clear that when a matter is referred to [the Committee], it must be allowed to fulfil its mission"[10].

10. Before the CERD Committee, the UAE argued that the Committee should dismiss Qatar's Communication in favour of the ICJ, claiming that "it would be wholly inappropriate for the CERD Committee to proceed to entertain this case"[11]. And now, in a profound reversal, the UAE comes before the Court to order that Qatar *to terminate* the consideration of this matter by the CERD Committee. Mr. President, Honourable Members of the Court, the UAE, in other words, seeks to leave Qatar with *no remedy at all, either before the Court or before the CERD Committee*. This cannot possibly be the solution that the Convention envisioned.

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[7] International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"), 21 Dec. 1965, United Nations, *Treaty Series (UNTS)*, Vol. 660, Art. 12 (1) (a).

[8] Request for the indication of provisional measures submitted by the United Arab Emirates (hereinafter "RPMUAE"), 22 Mar. 2019, p. 33, para. 74 (i).

[9] CR 2018/13, p. 21, para. 8 (6) (Pellet) (English translation).

[10] CR 2018/13, p. 26, para. 21 (Pellet) (English translation).

[11] Annex 30, ICERD-ISC-2018/2, Comments on Qatar's Response on Issues of Jurisdiction and Admissibility, 19 Mar. 2019, p. 6, para. 15.

11. As a legal matter — for reasons that my colleagues will explain — it is reasonable to ask whether the Request actually was motivated by a desire to intimidate the Committee or otherwise delay the Committee's procedures, including the formation of the Conciliation Commission. But if one thing is even more clear, it is that the Request turns on its head the entire international legal system devoted to peaceful resolution between States parties. And I end where I began: on what conceivable basis can the UAE with a straight face tell the Court that it stands to be irreparably harmed by Qatar's attempt to conciliate this dispute? Mr. President, Honourable Members of the Court, ~~***there is***~~ no such basis exists.

12. Indeed, this fundamental contradiction is one of the reasons the UAE's Request for provisional measures should be rejected. Much of the UAE's Request**,** and the oral submissions before you yesterday**,** was dedicated to mischaracterizing Qatar's conduct with respect to a visa application website, which the UAE argues is an effective remedy for its own violation of the Convention. There are many reasons that the website cannot be considered a remedy for the UAE's discriminatory measures, and in fact, it is in part a discriminatory mechanism implemented on an arbitrary basis and hence inconsistent with the Convention. Qatar has addressed those reasons in its Memorial submitted to the Court on 25 April 2019[12], and will address them again in a later and appropriate stage of these proceedings.

13. For now, it is sufficient to say that in autumn of 2018, the UAE's network of websites related to its visa application system was found to contain a high risk of security breach because of a defective security control and the existence of malware — which is a malicious code specifically designed to disturb, damage or gain unauthorized access to a computer system. As a result, the UAE's website was red-flagged by the relevant regulatory authorities, Qatar's Communications Regulatory Authority — "CRA" — and the Cyber Security Sector in the Ministry of Transportation and Communication. Accordingly, access to the website was suspended in Qatar on 1 January 2019 in order to protect Qataris' private and sensitive identity and travel information from being exposed to security breach.

[12] Memorial of the State of Qatar (hereinafter "MQ"), 25 Apr. 2019, pp. 208–217, 274–289, paras. 4.43-4.53, 5.71-5.93.

14. I note that a week ago, Qatar submitted a letter detailing the security risks identified in the UAE's website, including the specific technological steps that would need to be taken in order for access within Qatar to be restored. The UAE is in no doubt well aware of the importance of taking such steps, and as a matter of a *basic* cyber security. And yet, the UAE has been aware of the problem for at least a week, and the UAE took no step to resolve this matter. Qatar respectfully submits that the UAE's assertions related to the website should be viewed with great scepticism in light of its posture before the Court.

15. The UAE's Request further seeks an order to stop certain media outlets from "disseminating false accusations" about the UAE[13], calling Al Jazeera and other media channels a "propaganda tool"[14] for Qatar. As an initial matter, there is no such "disseminat[ion] of false information" of the UAE — the only example the UAE gives is that the outlets use the word "siege" to describe its discriminatory measures[15]. And the media statements of which the UAE complains are ordinary-course of news coverage from private media sources, including Al Jazeera network, which has been widely recognized as an impartial and a "key to enabling free expression" in the Gulf and in the Arab region[16].

16. This baseless accusation is nothing new — as the Court is aware, one of the UAE's demands for lifting the discriminatory measures imposed on 5 June 2017 was that Qatar close Al Jazeera. This led the international human rights organization Reporters Without Borders to call the UAE's demand "a grave attack on press freedom"[17]. The Court is aware that Qatar claims that the UAE's discriminatory interference with Qatari-based media violates the protection of the Convention, specifically ***in*** Article 5 relating to the freedom of expression, and in fact, the silencing of independent media voices is part and parcel of the UAE's campaign of incitement of racial hatred against Qataris, again in violation of the Convention.

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[13] RPMUAE, pp. 33–34, para. 74 (iii).

[14] RPMUAE, p. 9, para. 19.

[15] RPMUAE, p. 22, para. 52.

[16] Article 19, "Qatar: Demands to close Al Jazeera endanger press freedom and access to information", 30 June 2017, https://www.article19.org/resources/qatar-demands-to-close-al-jazeera-endanger-press-freedom-and-access-to-information/.

[17] "Unacceptable Call for Al Jazeera's Closure in Gulf Crisis", Reporters Without Borders, 28 June 2017, https://rsf.org/en/news/unacceptable-call-al-jazeeras-closure-gulf-crisis.

17. Likewise, the UAE attempted to silence Qatar's National Human Rights Committee. This independent, national human rights body that is generally recognized for its competence and independence from the Qatari Government, as reflected in its "A" rating by a panel of third-party reviewers on which a section of the Office of the High Commissioner for Human Rights is a permanent observer[18].

18. With respect, it is plainly inappropriate of the UAE to approach the Court with a request to order Qatar to interfere with the work of an institution whose very existence and integrity depend on its independence from the Government.

19. The UAE dedicated a portion of its Request and submissions before the Court yesterday to irrelevant and outrageous allegations attempting to connect Qatar to support terrorism. These allegations are quite familiar to the Court based on the UAE's unsupported statements at the last provisional measures hearing. In fact, the UAE's allegations are purely pretextual and simply untrue. The UAE's tedious repetition of these lies does not make them any more credible. Qatar has long been an active participant in the global fight against terrorism, and it will continue to be. In any case, the UAE's unfounded allegations could never be used to justify its violation of the CERD Convention. As the Convention itself states, "there is *no justification* for racial discrimination, in theory or in practice, anywhere"[19].

20. Finally, Mr. President and Honourable Members of the Court, the UAE represented in its Request and submissions before the Court yesterday that Qatar has "fabricated" evidence[20]. These allegations are highly inappropriate and relate in a large part to unsupported accusations[21] regarding a decades-old case that has *nothing* to do with the present dispute. The UAE's further suggestion that Qatar's redaction of identifying information in its witnesses' declarations ***could*** constitute~~s~~ fabricated evidence is also absurd. Even putting aside the hypocrisy of this argument — the UAE has itself submitted evidence that are in redacted form including during the provisional

[18] Annex 31, "Chart of the Status of National Institution, Accredited by the Global Alliance of National Human Rights Institutions, Accreditation status as of 04 March 2019", GANHRI, 20 Mar. 2019, p. 3.

[19] CERD, Preamble; emphasis added.

[20] See e.g. CR 2019/5, p. 22, paras. 24, 43, p. 27 (Volterra); see also RPMUAE, p. 9, para. 19.

[21] W. Michael Reisman & Christina Skinner, Fraudulent evidence before public international tribunals 188, 2014.

measures hearing last year[22] and in *this* proceeding[23] — those declarations were redacted "to protect the safety and security of the witnesses, as well as related persons"[24], who deeply fear retaliation by the UAE, including themselves and family members and interests connected to the UAE.

21. Mr. President, Honourable Members of the Court, despite all of the UAE's posturing, this dispute is still about a human rights violation. At the same time the UAE comes before this Court seeking the protection of what it calls or claims are its "procedural rights" in this case[25], it continues to enforce discriminatory policies that severely impact the life of Qataris — only *because* they are Qatari.

22. The UAE also continues to tolerate, but also to actively incite, anti-Qatari hatred. As a result, hostility and hatred based on the fact that a person of a Qatari national origin have become widespread in the UAE.

23. Mr. President, Honourable Members of the Court, it is the Qatari people who are the true victims of this racial discrimination case — not the Government of the UAE.

24. Mr. President, Qatar's distinguished counsel will now explain why the UAE's Request for provisional measures does not fulfil the basic requirements of Article 41 of the Statute that must be met in order for the Court to grant provisional measures in this regard, to demonstrate that the UAE's Request must therefore be rejected.

25. *First*, Mr. Vaughan Lowe will address how the UAE's Request does not fall within the scope of the Court's authority under Article 41 of the Court's Statute to order provisional measures.

26. *Second*, Mr. Lawrence Martin will demonstrate the reasons why the Court should not grant the UAE's first request, which asks that the Court order Qatar to terminate the ongoing proceedings before the CERD.

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[22] See Cover letter from Saeed Ali Yousef Alnowais, Agent of the United Arab Emirates, to H.E. Mr. Philippe Couvreur, Registrar of the International Court of Justice, 25 June 2018, p. 2; exhibits 3, 5, 6, 9, 11 from oral proceedings on the Request for the indication of provisional measures of protection of the State of Qatar dated 11 June 2018.

[23] See RPMUAE, Annex 17.

[24] Letter from Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs of the State of Qatar, to H.E. Mr. Philippe Couvreur, Registrar of the International Court of Justice, 25 Apr. 2019, p. 1.

[25] RPMUAE, p. 11, para. 24.

27. *Third*, Ms Catherine Amirfar will demonstrate the reasons why the Court should not grant the UAE's other requests, which ask the Court to order Qatar to take far-reaching actions on the basis of a theory of aggravation on the dispute that is lacking legal and factual merit.

28. *Finally*, Professor Pierre Klein will explain why the indication of any of the requested measures would disproportionately harm Qataris' rights in these proceedings, and why the UAE's Request should be rejected for that reason alone.

29. Mr. President, Members of the Court, I thank you for the privilege of appearing before you, and I now kindly ask you to invite Mr. Vaughan Lowe to address the Court.

The PRESIDENT: I thank the Agent of the State of Qatar. I shall now give the floor to Mr. Vaughan Lowe. You have the floor.

Mr. LOWE:

II. THE UAE'S REQUEST FOR PROVISIONAL MEASURES DOES NOT FALL WITHIN THE SCOPE OF THE COURT'S POWER UNDER ARTICLE 41 OF THE STATUTE

A. Introduction

1. Thank you, Mr. President, Members of the Court: it is a privilege to appear before you, and an honour to have been entrusted with the presentation of this part of the submissions of the State of Qatar.

2. My task is to outline the reasons why Qatar considers this Application by the UAE for an order of provisional measures to be wholly inappropriate, and why the UAE's requests lie beyond the scope of the procedure under Article 41 of the Court's Statute. My colleagues will then develop Qatar's specific responses to each of the UAE's requests.

3. No doubt it is tempting to regard a provisional measures application as an occasion on which to get in a few early blows against the other party before the case comes up for a hearing on the merits, or even for a hearing on preliminary objections. But under Article 41 the only question that is before the Court at this stage is what steps, if any, need to be taken to preserve the respective rights of the Parties between now and the time of the case coming back to you for a hearing.

4. The UAE requested, in paragraph 74 of its 22 March Application, that the Court order four provisional measures. In summary, they are that Qatar:

(i) withdraw its Communication to the "CERD Committee" and terminate its consideration by that Committee;

(ii) desist from hampering the UAE's attempts to assist Qatari citizens, including by unblocking access to a particular website that purports to enable Qatari citizens to apply for permits to return to the UAE;

(iii) to stop its national bodies and its State-funded media outlets from aggravating the dispute by disseminating false accusations regarding the UAE and the issues before the Court; and

(iv) to refrain from any action that might aggravate or extend the dispute.

5. Essentially, the UAE is asking the Court to impose a redundant non-aggravation order; to restrict the output of an independent human rights committee and of independent media outlets; to prevent Qatar from taking measures in its own territory to protect its own citizens' cyber security; and to close the CERD dispute resolution system to Qatar.

6. The question is whether the UAE has demonstrated that the rights for which the UAE is requesting protection are plausible, that they are linked to the requested measures, and whether the UAE has evidenced the urgency and imminence of irreparable harm to its rights in issue in this case so as to provide a basis on which the Court might indicate such measures.

7. A substantial part of the UAE Application, and most of its oral submissions yesterday, are irrelevant to the Court's current task. For example, much attention was given to a reiteration of points from the objections that the UAE had already raised to the Court's prima facie jurisdiction to indicate the provisional measures requested by Qatar last year, and which the UAE has repeated in its preliminary objections.

8. Indeed, much of the UAE's Application appears to range not only over the ground covered by provisional measures, but also over the ground covered by preliminary objections, and over questions of merits — not to mention the completely irrelevant reminiscences concerning the case initiated by Qatar against Bahrain in 1991 — as if they were one and the same thing and all relevant to the UAE's Article 41 Application.

9. Many other submissions were simply repetitious, making the same points over and over again; or bafflingly pointless, such as the attack on the authenticity of an NHRC document that has not even been submitted in evidence in this case, or the criticism that the first draft of Qatari citizens were drawn up by someone before, in the words of the UAE's slide 7: "All declarants reviewed their declarations to ensure the truth and accuracy of the statements and make any necessary revisions before the finalization of the declarations."

B. Request (iv)

10. I shall address the UAE's requests in reverse order, starting with the fourth, the request for a non-aggravation order.

11. Qatar has no wish whatever to aggravate or extend the dispute, or to make it more difficult to resolve. Furthermore, Qatar acknowledges that it, like every other State party to proceedings before this Court, is under a legal obligation to refrain from such actions.

12. The UAE thus has already what it seeks: an explicit statement in the Order of 23 July 2018 that Qatar, like the UAE itself, is under a binding legal obligation to refrain from any action that might aggravate or extend the dispute before the Court or make it more difficult to resolve.

13. It may be that the UAE thinks that whatever might happen to the rest of its Application, it can bank on the Court at least giving it a non-aggravation order. It may be seeking to set a precedent for States returning to the Court for repeated provisional measures orders restating provisional measures orders already made before the Court.

14. If that is the UAE's claim, and if the Court is minded to make such an order, Qatar submits that it should be directed to the UAE, whose reluctance to accept that the 2018 Order requires it to do anything at all was discussed in paragraphs 6.6 to 6.17 of Qatar's Memorial.

C. Request (iii)

15. I turn to request (iii): stopping national bodies from aggravating the dispute. To the extent that it is a general request for a non-aggravation order, the UAE's third request is similarly redundant.

16. To the extent that it is a request that the Court suppress the voices of Al Jazeera and Qatar's National Human Rights Committee, this extraordinary request is an attempt to enlist the

Court in the UAE's attack on free expression, which is the very subject of Qatar's claim in Chapter V, section (iii) of its Memorial. In insisting that its claims are — even if unsupported here by evidence — all true, so that the NHRC and Al Jazeera must be silenced, while Qatar's account is all fabricated falsehoods, the UAE seeks to have the Court anticipate decisions that very obviously belong to the merits phase of this case.

17. Qatar did not and will not make or encourage the making of false statements, or engagement in so-called "hate speech". But neither will Qatar suppress fair reporting by the media and by human rights organizations within the State. Provisional measures applications cannot be used by the UAE as instruments for controlling foreign media and buying a few more months, and maybe years, free from criticism.

D. Request (ii)

18. The second requested order is that Qatar desist from hampering the UAE's attempts to "assist" Qatari citizens, and that Qatar unblock the website by which (if they do not wish to use the UAE hotline, which of course remains open) they can apply for a permit to return to the UAE.

19. It should not need to be said that Qatar has no wish to prevent any State adopting measures that advance the welfare and interests of Qatari citizens. Equally, it should be obvious that if Qatar sees another State taking measures that harm Qatari citizens, Qatar will protect its own citizens. The UAE website is at serious risk of being infected by malware and is therefore not a secure platform to upload confidential information. The idea that the Court should order the unblocking of a website subject to such a security risk is remarkable; and in any event, Qatar has already told the UAE, in its letter last week, that it will stop blocking the site as soon as it is made safe[26]. It is not yet safe. Only the UAE can make it safe. The remedy is in its own hands.

20. My colleagues will return to the merits of this request, which bear upon the impact on individual human beings that is at the heart of this case; but my task is to make a more abstract point concerning the UAE's attempt to force this request into the framework of Article 41 of the Statute.

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[26] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019, para. 15.

21. The blocking of the website is portrayed by the UAE as an action that creates "false evidence" and — in the current phrase — "fake news" by exacerbating the hardship that Qatar says is caused by the UAE measures. The UAE also says that it makes the dispute harder to resolve[27].

22. The "false evidence" point is a wholly unparticularized and unsubstantiated accusation, apparently made for purely prejudicial purposes, which Qatar strongly denies. If the UAE wishes to make and substantiate this allegation, rather than simply cast aspersions, it should do so at the merits phase. It is not a matter for provisional measures.

23. And it should do so according to the standards of proof that it proclaims. The irony of castigating Qatar for the lack of independent verification of its claims, when the main planks of the UAE's submissions have been a *mélange* of press clippings and unsubstantiated testimony and assertions by its counsel, will not have gone unnoticed.

24. As to the allegation that Qatar is aggravating the dispute and making it harder to resolve, Qatar's action has been driven by the need to take steps to protect its own citizens. The UAE may dislike that action; but it can hardly be said that a State "aggravates" a dispute by taking steps to prevent some of the adverse effects of the offending measures taken by the other party. And if the UAE fears that it will not get full credit for whatever steps it takes to ameliorate the effect of its measures upon Qatari nationals, the answer again is that this is a matter for the merits phase.

25. There is no "right" of the UAE that is in peril here, no threat to the resolution of the dispute, that would warrant the ordering of provisional measures.

E. Request (i)

26. I turn to the first request. It calls for the Court to intervene in the CERD proceedings by ordering Qatar to withdraw its communication to the CERD Committee and terminate its consideration there. The Court will recall that the UAE has already, during the June 2018 hearing on provisional measures, presented its argument that the CERD proceedings are a bar to recourse to the Court; and Qatar has already responded to those arguments. Nonetheless, we address the point again here.

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[27] See RPMUAE, p. 22, para. 51, p. 32, para. 73.

27. Part of the UAE's reasoning is that the CERD Communication filed by Qatar on 29 October 2018 has created a *lis pendens* situation which violates basic notions of procedural fairness that "require a party to avoid duplicative and potentially conflictual litigation"[28], and deprives the UAE of its right to equality of arms in this case.

28. The main response to this request is that it is plainly an objection to the jurisdiction of the Court or to the admissibility of the claim — and indeed, it was raised as such by the UAE during the 2018 provisional measures phase[29]. It is a matter for the preliminary objection or merits phase, not for a provisional measures application.

29. That point is sufficient to dismiss the request; but even on its own terms, the UAE reasoning on *lis pendens* fails at practically every step; and the failure represents the fundamental contradiction presented by the UAE's second requested measure, as my colleague Mr. Martin will explain.

30. To start, the UAE does not explain where the international law principle of *lis pendens* comes from[30] (and unlike *res judicata*, it cannot be derived directly from the Court's Statute)[31], or how it fits in to the list of sources of law in Article 38 (1) of the Court's Statute, or what the content of the principle is. ***And t***hese are not purely academic points: they matter, in the context of this Application.

31. If *lis pendens* is a rule or principle of customary international law, applicable under Article 38 (1) *(b)* of the Statute, its content falls to be determined by the normal examination of the scope of the underlying State practice and *opinio juris.* If it is a general principle of law recognized by civilized nations, applicable under Article 38 (1) *(c),* we should look at a different body of material, finding the common ground, and making submissions on the appropriateness of applying a domestic law principle, which might be a rule of law or a rule of comity or a label for judicial discretion, within an international context.

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[28] RPMUAE, p. 26, para. 60.

[29] CR 2018/13, pp. 26-27, paras. 22-24 (Pellet).

[30] Cf. *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 20.

[31] See *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 (I)*, pp. 90-93, paras. 115–120.

32. But in either event, important questions of its content arise. Does it apply only between two courts, or also between courts and other tribunals with the power to render legally binding decisions?

33. *Lis pendens* and *res judicata* are closely related legal principles that ensure that a single dispute is not improperly submitted to more than one tribunal for determination. If there is such a principle applicable here, in the form in which it is commonly applied in domestic courts it applies to questions of pendency between *judicial* tribunals, i.e. tribunals invested with the authority to hear and determine a legal dispute[32].

34. The first flaw in the UAE argument is that the CERD Committee is not a judicial tribunal. As Articles 11–13 of the CERD Convention make clear, the CERD procedure in respect of inter-State communications consists in the appointment of a Conciliation Commission, whose role is to investigate the matter, to report on any factual findings, and to make recommendations for the amicable solution of the dispute. The States concerned are free to accept or reject the Commission's recommendations as they see fit.

35. The Court is the principal judicial organ of the United Nations. The CERD Committee monitors the implementation of the Convention[33]; the CERD Conciliation Commission makes recommendations for an amicable settlement. Neither the Committee nor the Conciliation Commission is a judicial body to which the principle of *lis pendens* might apply. The principle is not applicable in these circumstances.

36. Moreover — and this is a second flaw — even if the *lis pendens* doctrine were in principle applicable here, the situation does not meet the criteria for the application of the doctrine — that is, that the identical dispute be put before two courts.

37. The UAE suggests that the CERD and ICJ proceedings are the same[34]. Yesterday, Professor Reisman said that Qatar "seeks the same relief" from the CERD and from the Court[35].

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[32] See e.g. P. Barnett, *Res judicata, Estoppel, and Foreign Judgments*, 2001, pp. 11-12. Cf., F. De Ly & A. Sheppard, "ILA Interim Report on Res Judicata and Arbitration", *Arbitration International*, Vol. 25, Issue 1, 2009.

[33] See OHCHR, *Committee on the Elimination of Racial Discrimination*, https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx.

[34] RPMUAE, pp. 18-19, paras. 41-44, p. 26, para. 60.

[35] CR 2019/5, p. 28, para. 3 (Reisman).

That is, with respect, plainly incorrect. The proceedings and the relief sought are patently not identical.

38. In its 8 March 2018 CERD Communication, Qatar's "prayer for relief" asked that the CERD Committee "transmit this Communication to UAE for UAE to (a) respond within the three month period set forth under [CERD Article 11], and (b) take all necessary steps to end the Coercive Measures, which are in violation of international law and its obligations under the CERD"[36]. The CERD Committee was not asked to adjudicate upon anything, but only to transmit to the UAE a request that *the UAE* end the Coercive Measures. Qatar also reserved "its right to all other dispute resolution avenues open to it"[37].

39. Similarly, Qatar's 29 October 2018 Note Verbale to the CERD Committee simply announced that Qatar was exercising its right under CERD Article 11 to refer the matter a second time in the quest for an amicable solution[38]. It is a request for the assistance of a conciliation commission.

40. The contrast with Qatar's prayer for relief in paragraphs 7.16 to 7.22 of its Memorial, which asks this Court to adjudge and declare a series of breaches of international law, and to order the UAE to take a series of steps, could not be more clear.

41. The UAE says that these allegedly "duplicative" proceedings violate its rights. But that begs the question, what are those rights?

42. There is no rule of international law that says that where one State has a complaint against another it may pursue only one procedure against that other State. What is wrong with seeking an amicable solution to a dispute at the same time as the matter is before the Court? How can that be an "abuse of rights"[39]?

43. Indeed, Article 16 of the CERD — to which the UAE signed up, but omitted from its survey of CERD procedures yesterday — says exactly the opposite. It reads as follows — it is ***in*** your folders and on the screen:

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[36] RPMUAE, Annex 20, p. 51, para. 123.

[37] RPMUAE, Annex 20, p. 51, para. 124.

[38] RPMUAE, Annex 21, p. 4.

[39] See RPMUAE, p. 15, para. 34.

> "*The provisions of this Convention concerning the settlement of disputes or complaints* [there is then a passage dealing with human rights procedures] 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*." (Emphasis added.)

44. There is no bar on parallel proceedings. The CERD drafters considered the matter, and they decided expressly to permit them.

45. The suggestion that it is a violation of the UAE's rights that it should be forced to "show its hand regarding its litigation strategy"[40] in the CERD, thus impairing its submissions in the Court, or vice versa, is equally baffling. Concealing hands is a sound practice in games where surprise is the essential route to winning; but this is not a game. Where is the evidence of a right to conceal a defence, or hold back submissions, before this Court? In Qatar's submission, there is no such right.

46. The suggestion that the principle of "equality of arms" will be violated, and that it is a procedural abuse to expose the UAE to the CERD conciliation and to the Court, cannot stand. Nor, as my colleagues will explain, is there any reason to suppose that the exercise of Qatar's rights to request a CERD conciliation risks aggravating or extending the dispute — indeed, it is difficult to understand how a participant in a conciliation procedure could regard it as aggravating the dispute.

47. Professor Reisman, a most distinguished lawyer whose views command the highest respect, says that this is a case of first impression on the question of relations between the Court and human rights bodies. In Qatar's submission, different bodies and institutions within the realm of international law have their particular roles, often played out in parallel with one another, just as the Court and the Security Council have acted in parallel in the past.

48. The fact that in a regional or global body one process might lead to an amicable settlement, while another might lead to a final judicial determination that would itself form the basis on which international relationships can be rebuilt, is an essential characteristic of the system for handling international disputes. Neither process is inherently "better" than the other; neither

[40] CR 2019/5, p. 35, para. 30 (Reisman).

precludes nor pre-empts the other. Each has its part to play in what is the simple, single aim: to bring about a peaceful, just and durable adjustment of international disputes.

49. The other part of the reasoning offered by the UAE in support of its first requested measure is its interpretation of the CERD as imposing an exclusive "linear and incremental dispute resolution procedure", which it sees as moving from the Committee to a Commission to the Court, unless the dispute is resolved at an earlier stage[41]. The suggestion is that this constitutes a "right" which the UAE is entitled to have protected by a provisional measures order.

50. The Convention does not stipulate such an exclusive "incremental" procedure. Qatar argued this point in detail in paragraphs 3.138 to 3.148 of its Memorial. Moreover, the terms of CERD Article 16 point to the opposite conclusion.

51. But in any event, the suggestion is misplaced and mistimed.

52. In so far as it is an objection to the jurisdiction of the Court, it has been addressed once, in paragraphs 36 to 41 of the Court's 23 July 2018 Order for Provisional Measures in this case, where the Court ruled that, prima facie, it has jurisdiction in respect of Qatar's Application.

53. In so far as the UAE wishes to try to overturn the Court's prima facie decision, that is a matter for the preliminary objections in this case.

54. And in so far as it is a suggestion that the CERD Committee should decline to consider Qatar's Communication, that is a matter that the UAE should raise in the CERD Committee.

55. Whatever else it might be, the "linear and incremental dispute resolution procedure" that the UAE says it discerns in the CERD is not a "right" of the UAE that can be protected in a provisional measures procedure that is an adjunct to Qatar's claim in this case.

56. The UAE also says that it "will be forced to choose between forsaking its rights to mount a full defence in the CERD Committee proceeding or sacrificing its right to procedural equality in the present case"[42]. It does not explain why it thinks that this is so; and there is no obvious explanation. Each procedure is separate, and the UAE will have an opportunity in each proceeding, according to the relevant procedure, to put its views before the relevant body, as will Qatar. The procedural rights of both Parties are protected, and they are equal.

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[41] RPMUAE, pp. 26-27, paras. 61-62.

[42] RPMUAE, p. 28, para. 65; see *ibid.*, p. 32, para. 72.

F. Closing

57. Mr. President, that brings me to the end of my submissions on behalf of the State of Qatar, and unless I can assist the Court further, I would ask that you invite Mr. Martin to the podium.

The PRESIDENT: And I will now give the floor to Mr. Martin. You have the floor.

Mr. MARTIN:

III. THE FIRST PROVISIONAL MEASURE THE UAE REQUESTS SHOULD BE REJECTED

1. Mr. President, distinguished Members of the Court, good morning. It is an honour to appear before you today on behalf of the State of Qatar. As the Agent, Dr. Al-Khulaifi, said, my task this morning is to explain why the Court should reject the first provisional measure the UAE requests.

2. The UAE's first requested measure is that the Court order Qatar to both "immediately withdraw its Communication submitted to the CERD Committee", and to "take all necessary measures to terminate consideration thereof by the CERD Committee"[43]. The alleged object of this measure, according to the UAE, is to "protect the UAE's procedural rights both under the CERD and in this proceeding from Qatar's abusive parallel claims"[44].

3. I will discuss three reasons this measure should be rejected — each one of which is independently sufficient:

— *One*, the object of the UAE's request is improper. The alleged rights the UAE seeks to protect have nothing to do with the subject-matter of this case on the merits.

— *Two*, the measure, if granted, would do exactly what provisional measures may *not* do: prejudge questions of jurisdiction and admissibility. In fact, just last week, the UAE raised many of the same issues it does now in the form of preliminary objections. *That* is the appropriate procedure for dealing with these issues, not this one.

[43] RPMUAE, para. 74 (i).

[44] RPMUAE, para. 24.

— *Three*, and in any event, there is no risk of prejudice, let alone a real and imminent risk of irreparable prejudice, in these proceedings to any of the alleged procedural rights the UAE invokes.

4. There are still other reasons the first measure should be rejected. My friend Ms Amirfar will explain that, to the extent the UAE bases its request on the theory that it is necessary to prevent the aggravation or extension of the dispute, it is equally unjustified. And at the end of Qatar's submissions today, my friend Professor Klein will explain that it must also be rejected because it threatens disproportionate prejudice to Qatar's rights in dispute.

A. The object of the UAE's first request is improper

5. Mr. President, I will get right to it, and explain why the object of the UAE's first request is improper. It is improper because the UAE seeks to protect procedural rights that do not form the subject-matter of this case on, nor are they connected to, the merits — something the Court has always required for the indication of provisional measures.

6. In its written Request for provisional measures, the UAE claims that the Court has the power to consider the requested measures because "in its 23 July 2018 Order, the Court found that it had *prima facie* jurisdiction over the present [dispute]", and thus "that *prima facie* jurisdiction also extends to this Request"[45].

7. It is true, of course, that the Court previously held that it has prima facie jurisdiction over the case that Qatar submitted to it. But that, by itself, is *not* enough. More is required. In particular, the rights for which the UAE seeks protection must form the subject-matter of the case *on the merits*. Here, they plainly do not.

8. As early as the *South-Eastern Greenland* case, the Court's predecessor held in its Order on interim measures that "the rights which it might be necessary to protect are . . . *solely* such sovereign rights as the Court might, *in giving judgment on the merits*, recognize as appertaining to one or other of the Parties"[46].

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[45] RPMUAE, para. 30.

[46] *Legal Status of the South-Eastern Territory of Greenland, Order of 3 August 1932, P.C.I.J., Series A/B, No. 48*, p. 288; emphasis added.

9. This Court has consistently adopted the same approach. The case concerning the *Arbitral Award of 31 July 1989* between Guinea-Bissau and Senegal illustrates the point perfectly. The subject-matter of that case on the merits was the validity of a 1989 arbitral award concerning the parties' maritime boundary, which Guinea-Bissau challenged the validity of[47]. Guinea-Bissau came to the Court requesting provisional measures in the form of an order requiring Senegal to desist from any activities in what Guinea-Bissau still considered the disputed area[48].

10. The Court rejected Guinea-Bissau's request, and it did so in revealing fashion. The Court first stated that the "purpose" of indicating provisional measures is "to protect 'rights which are the subject of dispute in judicial proceedings'"[49]. It then proceeded to reject Guinea-Bissau's request because "the alleged rights sought to be made the subject of provisional measures" — that is, the right not to have activities conducted in the disputed area — "*are not the subject of the proceedings before the Court on the merits of the case*" — that is, the validity of the arbitral award[50].

11. It is worth noting that the Court took this approach even though it was acting as a court of general jurisdiction. The Court had jurisdiction to adjudicate the dispute Guinea-Bissau submitted to it by virtue of the parties' matching Declarations under Article 36 (2) of the Statute. Nevertheless, it still insisted on strict correspondence between the rights the protection of which is sought, on the one hand, and the rights that are the subject of the dispute on the merits, on the other.

12. The Court took the same approach in the only other case in which, to Qatar's knowledge, a respondent initiated a request for provisional measures: the *Pulp Mills* case. The Court will recall that Uruguay brought a provisional measures request asking it to order Argentina to lift the blockade by Argentine protestors of a bridge connecting the two countries[51]. Argentina argued that

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[47] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 64, para. 1.

[48] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 65, para. 3.

[49] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 69, para. 24 (quoting *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 9, para. 25; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36.

[50] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26; emphasis added.

[51] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 7, para. 13.

the request should be rejected because there was no link between the substance of the case and Uruguay's request[52].

13. In its Order, the Court turned to the other conditions for the indication of provisional measures — namely, urgency and irreparable injury — only *after* examining "the *link* between the alleged rights the protection of which is the subject of the provisional measures being sought, and *the subject of the proceedings before the Court on the merits of the case*"[53]. The Court approached the rights asserted by Uruguay, including the right to build the pulp mill — Argentina's challenge to which formed the very subject-matter of the case — by asking whether they "have a *sufficient connection with the merits of the case*"[54]. Of course, the Court ultimately rejected Uruguay's request because it determined that the rights Uruguay asserted were not threatened with irreparable harm[55].

14. In its subsequent orders on provisional measures, the Court has repeatedly insisted on this same critical link between the rights which form the subject of proceedings *on the merits* and the measures requested[56]. In its 22 March Request for provisional measures, the UAE made no mention of this required "link". Yesterday, during the UAE's oral presentations, Professor Volterra did. But in the process he admitted exactly the point we are making now. In listing the requirements for the indication of provisional measures, he explicitly recognized the need for the

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[52] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 8, para. 20.

[53] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 10, para. 27; emphasis added.

[54] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 11, para. 30; emphasis added.

[55] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, pp. 13-14, paras. 40-43.

[56] See *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1166, para. 72; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 23; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 403, para. 16; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 360, para. 25; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 54; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports* 2008, p. 388, para. 118; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico *v.* United States of America) *(Mexico* v. *United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, pp. 326-327, para. 58.

rights the protection of which is sought to have a "sufficient connection with the merits of the case"[57], just as the Court said in *Pulp Mills*.

15. Even as he admitted that what is required is a connection with the merits of the case, Professor Volterra elsewhere tried to loosen this requirement. In another portion of his presentation he claimed that "all that is required is that the right is involved in, or may be affected by, the Court's determination of the dispute"[58]. That, however, is neither what the Court's jurisprudence says, nor what it stands for. The Court's decision in *Guinea-Bissau* v. *Senegal* shows that it is not enough that the right is merely "involved in, or may be affected by, the Court's determination of the dispute". If that were ~~***enough***~~ ***the case***, the outcome ~~***in that case***~~ would have been different. Rather, precisely as the Court said in that case, the right must form "the subject of the proceedings before the Court on the merits of the case"[59].

16. Mr. President, distinguished Members of the Court, that brings me to why the UAE's first request must fail. The procedural rights, the protection of which the UAE claims as the object of the first requested measure do *not* form the subject of the proceedings on the merits of this case.

17. As set out in Qatar's Application and in its recently filed Memorial, the subject of these proceedings on the merits concerns the rights of Qatar and Qataris under CERD to be free from the racially discriminatory conduct of the UAE — and in particular, the UAE's violations of Articles 2, 4, 5, 6, and 7 of CERD. The procedural rights the UAE invokes have nothing whatsoever to do with that subject-matter.

18. Let me be clear: we are *not* saying that the UAE does not have any rights that are the subject of these proceedings on the merits. We therefore have no quarrel with Professor Volterra's statement that it would be unjust to respondents "if the authority to indicate provisional measures was limited exclusively to the rights pled and relied on by applicants"[60]. We agree that the UAE does have rights in dispute on the merits. In just the same way that respondent Uruguay's rights on the merits in the *Pulp Mills* case included its right to build the pulp mill in the face of Argentina's

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[57] CR 2019/5, p. 19, para. 10 (Volterra).

[58] CR 2019/5, p. 19, para. 10 (Volterra).

[59] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26.

[60] CR 2019/5, p. 20, para. 14 (Volterra).

challenge, the UAE's rights at issue in this case are to take the steps, and adopt the measures it has, despite Qatar's objections. But the alleged rights the UAE seeks to protect now have nothing to do with those rights.

19. When he discussed the *Pulp Mills* case yesterday, Professor Volterra mentioned that the Court also found that Uruguay's rights in disputes on the merits included "the right to have the merits of the present case resolved by the Court"[61]. That too is true. But here again, the Court's focus was on the merits of the dispute, in particular Uruguay's rights to have the merits — whether its construction of the pulp mill was lawful — decided by the Court, rather than have a result forced on it by "unilateral acts of an extrajudicial and coercive nature"[62].

20. The alleged procedural rights the UAE invokes before you now are very different. Rather than being "the subject of the proceedings before the Court on the merits of the case", they relate solely to issues of jurisdiction. They are all premised on the UAE's very particular interpretation of the title of jurisdiction: Article 22 of CERD. In the UAE's view, "[the] attempt by Qatar to have two parallel proceedings under the CERD that progress at the same time is inconsistent with Article 22 of the CERD"[63]. Or, in the words of Professor Reisman, "[t]he key of the dispute resolution architecture, to which its parties consented, is 'sequentiality'"[64].

21. Qatar, of course, disagrees with this interpretation. We do not think there is anything remotely problematic about Qatar pursuing conciliation under the auspices of the CERD Committee at the same time it pursues this case before the Court. To that extent, the Parties' have a disagreement on a legal issue. But, as I said, that disagreement relates solely to issues of jurisdiction and admissibility. It has nothing to do with the "the subject[-matter] of [these] proceedings *on the merits*", properly understood. To put it another way, the rights the UAE invokes arise, if at all, only if the Court first accepts their arguments on jurisdiction. Still less do they raise any questions about the Court's ability to decide the case on the merits.

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[61] CR 2019/5, p. 20, para. 12 (Volterra).

[62] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 6, para. 12.

[63] RPMUAE, p. 16, para. 36.

[64] CR 2019/5, p. 32, para. 17 (Reisman).

22. This is not just a technical point, Mr. President. Our view here goes to the very purpose of provisional measures. Yesterday, Professor Volterra helpfully cited Judge Jiménez de Aréchaga's separate opinion in the *Aegean Sea* case. We thank him for that, because in that opinion Judge Jiménez de Aréchaga only underscored the essential connection between provisional measures and the merits of a case. He wrote: "The *essential object of provisional measures* is to ensure that the execution of a *future judgment on the merits* shall not be frustrated by the actions of one party *pendente lite*."[65]

23. And in his authoritative 2013 book, *The International Court of Justice*, Kolb writes:

> "The Provisional Measures requested by parties *must be designed to preserve the rights invoked in the substantive claim*, that is, those that are to be the subject of the final judgment. *One cannot seek the protection of rights other than those that are the subject of the main dispute.*"[66]

24. Here, the first provisional measure the UAE seeks is not designed to preserve any rights involved in the substantive claim. It should therefore be rejected on that ground alone.

B. Granting to UAE's first request would impermissibly prejudge questions of jurisdiction and/or admissibility

25. There are still other flaws with the UAE's request, which equally compel the same result. The Court has repeatedly made clear that any decision on provisional measures must not "prejudge[] the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves"[67]. The Court repeated this very statement in its Order on the provisional measures requested by Qatar in the present case[68].

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[65] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, separate opinion of President Jiménez de Aréchaga, p. 15; emphasis added.

[66] R. Kolb, *The International Court of Justice*, 2013, p. 625. See *ibid*.

[67] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, para. 101; *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 245, para. 60; *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. 140, para. 105.

[68] *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, I.C.J. Reports 2018*, p. 433, para. 78.

26. The UAE *itself* quotes this passage from the Court's Order in its written Request for provisional measures[69]. But it fails to see that it commands the rejection of the first measure it requests. Were the Court to grant it, it would impermissibly prejudge questions of jurisdiction or admissibility that may only be dealt with at a later date.

27. As I said, the UAE's argument in support of the first measure is premised entirely on its unilateral interpretation of Article 22 of CERD. In the section of its Request captioned "The Reasons Underlying the Request", the UAE says Qatar must be ordered to stop the CERD Committee proceedings because "Article 22 of the CERD specifically restricts this recourse [that is, to the Court] to be the final stage of a carefully crafted linear and hierarchical dispute resolution process"[70]. Yesterday, we heard much the same refrain from the other side. Professor Reisman argued that CERD creates "an integrated mechanism for dispute settlement, with the Court as the ultimate contingent decision-maker"[71].

28. As a preliminary matter, Qatar cannot help but note that the UAE's arguments are hopelessly self-contradictory. On the one hand, it says that Qatar must exhaust the CERD procedures before coming to the Court. On the other hand, it asks the Court to order Qatar to put an end to the very procedures that it says must be exhausted as a prerequisite to the Court's jurisdiction. The illogic of the UAE's position speaks for itself.

29. In any event, for the Court to order the first measure the UAE requests, it would first have to agree with the UAE and adopt its reading of Article 22. We consider that reading tortured in the extreme — but that is not the point now. The point is simply that this is not the appropriate stage to settle the matter. The Court cannot prejudge questions of jurisdiction and admissibility in the manner the UAE requests. In this respect, we note that the UAE made many of the same arguments it does now last year on Qatar's request for provisional measures in an effort to defeat the Court's prima facie jurisdiction. The Court declined to address those issues then, and there is no reason for it to take a different approach now.

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[69] RPMUAE, p. 12, para. 26.

[70] RPMUAE, p. 16, para. 36.

[71] CR 2019/5, p. 30, para. 10 (Reisman).

30. In its recently filed Preliminary Objections, the UAE effectively admits that the arguments it is raising before the Court now are really arguments about the Court's jurisdiction. It says: "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."[72]

31. Even in its Request for provisional measures, the UAE implicitly recognized that this is not the right time to raise these issues. In reserving its rights as to arguments on jurisdiction and admissibility, the UAE's written Request states that "[t]he UAE expressly reserves its right to submit arguments in respect of those questions [i.e. jurisdiction and admissibility] *at the appropriate stage of this proceeding*"[73]. We agree. The "appropriate stage" of this proceeding for the UAE to raise its arguments in respect of jurisdiction and admissibility is in the context of preliminary objections — as it has now already done — *not* provisional measures.

32. In this respect, Mr. President, I am reminded of the Court's decision on provisional measures in the *Interhandel* case. On Switzerland's request for provisional measures, the United States of America responded in part by raising an objection to jurisdiction. The Court decided that proceedings on provisional measures were not the appropriate stage for the United States to raise those arguments. Referring to the pre-1978 Rules, it stated:

> "Whereas the procedure applicable to requests for the indication of interim measures of protection is dealt with in the Rules of Court by provisions which are laid down in Article 61 . . .;
>
> Whereas the examination of the contention of the Government of the United States requires the application of a different procedure, the procedure laid down in Article 62 of the Rules of Court, and whereas, if this contention is maintained, it will fall to be dealt with by the Court in due course in accordance with that procedure".[74]

33. It is just the same here. The contentions of the UAE relating to jurisdiction and admissibility fall to be dealt with by the Court in short order in accordance with the procedures

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[72] Preliminary Objections of the United Arab Emirates, p. 110, para. 220.

[73] RPMUAE, p. 13, para. 28; emphasis added.

[74] *Interhandel (Switzerland* v. *United States of America), Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957*, p. 111.

relating to preliminary objections. That is a wholly different procedure from the one applicable to this Request for provisional measures.

34. For this reason as well, the UAE's first requested measure should be rejected.

Mr. President, I note the time. I only have a few more minutes, but I am in your hands as to whether you would like to take the coffee break now or when I finish.

The PRESIDENT: Please go ahead.

Mr. MARTIN: Thank you.

C. There is no urgent risk of irreparable prejudice to the UAE's "procedural rights" in this case

35. Still another reason why the first measure should be rejected is that the alleged "procedural rights" the protection of which the UAE seeks are not threatened with irreparable injury, urgently or otherwise.

36. In its written Request for provisional measures, the UAE claims that the first measure it seeks is designed to protect three procedural rights; namely, (1) "procedural fairness"; (2) "an equal opportunity to present its case"; and (3) the "proper administration of justice"[75]. As the UAE sees it, these rights are threatened with irreparable prejudice because Qatar has supposedly acted inconsistently with CERD by instituting "two parallel proceedings"[76]. As I explained, however, these rights could not possibly be prejudiced, even in theory, unless one accepted the UAE's interpretation of Article 22 of CERD, in so far as relevant to the issues of jurisdiction and admissibility.

37. Take, for example, the first "right" the UAE invokes: "procedural fairness". The UAE's written Request never explains why this right standing alone is imperilled. Instead, it treats it together with the second "right" it claims: the equality of parties. According to the UAE, these rights are imperilled because "Qatar has acted against basic notions of procedural fairness that require a party to avoid duplicative and potentially conflictual litigation"[77], and "[t]here can be no

[75] RPMUAE, p. 25, para. 58.

[76] RPMUAE, p. 16, para. 36.

[77] RPMUAE, p. 26, para. 60.

equality of the Parties when Qatar has unilaterally taken for itself two opportunities to litigate against the UAE in simultaneous and overlapping proceedings"[78]. We heard much the same from Professor Reisman yesterday.

38. But here again we see the circularity of the UAE's argument. The issues it points to can only arise if its core argument is correct. For instance, they say that "[i]f Qatar is not enjoined from proceeding with the Pending CERD Communication, there will no longer be a linear and incremental dispute resolution procedure"[79]. But we say the UAE's premise is wrong and its argument collapses with it. But in any event, again, that issue cannot be decided now.

39. Moreover, we fail to see how the conduct of two proceedings places the UAE in a comparative disadvantage vis-à-vis Qatar such that the principle of equality between the Parties might be called into question. Both Parties are in exactly the same position. Yesterday, Professor Reisman tried to give content to the UAE's assertions. He argued that the principle of equality of arms was somehow being violated because the UAE is being "required to show its hand"[80]. But even if that were true *(quod non)*, it would no more prejudice the UAE than Qatar. Qatar ***too*** has to fulfil the same substantive procedural obligations before both the Court and the Committee. Full equality between the Parties is assured.

40. And I think we can safely take it for granted that the Court will observe the strict equality of arms in these proceedings. Qatar has submitted its Memorial. The UAE has already exercised its right to submit preliminary objections, and the Court has given Qatar an opportunity to respond. Following that, the Court can be expected to schedule oral hearings at which both Parties will have equal opportunities to present their views.

41. When the matter returns to the Court on the merits, it will be just the same. The UAE will have a Counter-Memorial, likely followed by Qatar's Reply and the UAE's Rejoinder. Thereafter oral hearings, at which strict equality again will be guaranteed.

42. Nothing that happens before the CERD Committee threatens any of this, let alone with irreparable harm. The Court is the master of its own procedure and Qatar does not share the UAE's

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[78] RPMUAE, p. 26, para. 60.

[79] RPMUAE, p. 27, para. 61.

[80] CR 2019/5, p. 35, para. 30 (Reisman).

apparent doubts about its ability to fully safeguard both Parties' rights to "procedural fairness" and "equality" in these proceedings.

43. The situation is no different with respect to the third "procedural right" the UAE claims: the "proper administration of justice". Even though the UAE's written Request never explicitly says in exactly what way its right to the "proper administration of justice" is urgently threatened with irreparable prejudice, the nub of its argument seems to be that "if these proceedings are allowed to continue in parallel, both the UAE and Qatar would be exposed to a scenario where proceedings may lead to divergent or contradictory outcomes"[81]. This too is a prospect about which we heard a lot yesterday, along with a dramatic parade of horribles that would supposedly ensue.

44. The possibility of contradictory outcomes is, however, entirely speculative. It may very well be that the proceedings lead to entirely consistent outcomes — a scenario that is at least as plausible as the one the UAE envisages. But even if the UAE's scenario existed outside its imagination, one fails to see how it could threaten the UAE's rights to the "proper administration of justice". Indeed, the UAE's argument betrays a misunderstanding of the two proceedings so fundamental that it is hard to believe it is not deliberate. As Mr. Lowe explained just before, the CERD proceedings can, at best, lead only to a negotiated solution or non-binding recommendations of the Conciliation Commission. Neither the Committee nor the Conciliation Commission has the ability to issue legally binding determinations of fact or law.

45. This Court, in contrast, is the principal judicial organ of the United Nations. By virtue of Articles 59 and 60 of the Statute, its judgments are binding as between the parties, and final and without appeal. Qatar fully accepts that, and we trust that the UAE does as well. None of the "procedural rights" the UAE claims are therefore at risk of prejudice, let alone an urgent risk of irreparable prejudice, in these proceedings. For this reason too, we respectfully submit that the Court should reject the first provisional measure the UAE requests.

46. Mr. President, Members of the Court, that concludes my observations this morning. May I ask that you call Ms Amirfar to the podium, perhaps after the coffee break?

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[81] RPMUAE, p. 27, para. 62.

The PRESIDENT: I thank Mr. Martin. Before I invite the next speaker to take the floor, the Court will observe its usual break of 15 minutes. The hearing is suspended.

The Court adjourned from 11.35 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I will now call Ms Amirfar to take the floor. You have the floor, Madam.

Ms AMIRFAR:

IV. THE SECOND, THIRD AND FOURTH MEASURES THE UAE REQUESTS SHOULD BE REJECTED

1. Mr. President, Honourable Members of the Court, it is an honour to appear before you again on behalf of the State of Qatar.

2. The UAE has made little attempt to justify its second, third and fourth requested measures as necessary to protect the rights at issue in the dispute. My colleague Mr. Lowe already has summarized the measures requested, and I will deal with each of these in turn. But I start with a basic point: in its Request, the UAE did not even identify the rights in dispute on which it relies for purposes of these requested measures, stating only in conclusory fashion that the measures were necessary to avoid "aggravating" the dispute. Yesterday, the UAE acknowledged that a provisional measure of non-aggravation already exists, and for the first time, advised that it now seeks "distinct and specific" measures[82] based on non-aggravation. But the UAE asks the Court to do something the Court has never done — to indicate so-called "distinct and specific" provisional measures based solely on a theory of "non-aggravation". It further advised, for the first time, that these measures are necessary to "protect numerous rights of the UAE"[83]. These requests must fail, for two reasons.

3. *First*, the Court's prior jurisprudence makes clear that "non-aggravation" does not provide a standalone basis for provisional measures and that such measures cannot be granted in the absence of the indication of measures satisfying the Court's settled criteria and aimed at preserving the rights in dispute. *Second*, each of the measures the UAE requests is clearly unwarranted on the

[82] CR 2019/5, p. 41, para. 26 (Sarooshi).

[83] CR 2019/5, p. 21, para. 20 (Volterra).

facts, both in light of the Court's settled criteria for provisional measures, and even on the UAE's own conception of "non-aggravation". I will now address each of these issues in turn.

A. Non-aggravation cannot be a standalone basis for provisional measures

4. As my colleagues have earlier emphasized, Article 41 both confirms and limits the authority of the Court to order provisional measures; that authority extends, and is limited to, measures necessary to "preserve the respective rights of either party"[84]. As Mr. Martin has explained, the Court has made clear on multiple occasions that the rights for which protection is being sought must form the subject-matter of the case on the merits[85]. ***That is t***he key corollary to the point that while the Court's power to award provisional measures to preserve the specific rights in dispute is essential to the judicial function, it should only be exercised in exceptional circumstances[86].

5. It is in this context that one must assess the Court's extensive jurisprudence relating to non-aggravation, about which the Court heard very little yesterday and to which I will now turn. This jurisprudence makes clear that while the Court has "the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute"[87], non-aggravation cannot, standing alone, provide the basis for the indication of provisional measures.

6. The Court so held in *Pulp Mills*[88], which serves as the capstone to its jurisprudence on this issue. In that case, Uruguay requested general measures of non-aggravation, in addition to a specific measure related to the preservation of rights. Uruguay argued that such non-aggravation measures could be granted *irrespective* of whether the Court found that the specific measure was warranted[89].

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[84] Statute of the International Court of Justice, Art. 41.

[85] See e.g. CR 2018/12, pp. 51–52, paras. 2–4 (Goldsmith); *Legal Status of the South-Eastern Territory of Greenland, Order of 3 August 1932, P.C.I.J., Series A/B, No. 48*, pp. 283–288.

[86] See e.g. *Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 11, para. 32.

[87] See e.g. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, pp. 22–23, para. 41; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 44.

[88] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 3.

[89] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 14, para. 45.

7. The Court first assessed the specific measure requested, and concluded that it could not be justified by an imminent risk of irreparable prejudice to Uruguay's rights in dispute. Turning to the non-aggravation measures, it first noted that in *all* other cases where it had previously issued provisional measures directing the parties not to aggravate the dispute, "provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute . . . were also indicated"[90]. The Court thus concluded that "in the absence of the conditions for the Court to indicate the first provisional measure", the claim of aggravation arising from the action that was the subject of the specific measure did not justify, standing alone, the indication of the requested non-aggravation measures[91].

8. Since *Pulp Mills*, the Court has expressly acknowledged this complementary relationship between non-aggravation measures and specific measures to protect rights in dispute. In *Costa Rica* v. *Nicaragua*, for example, the Court, assessing Costa Rica's request for non-aggravation measures, first recalled its holding in *Pulp Mills*, and then concluded that there must be a link between the non-aggravation measures and the "rights which form the subject of the case before the Court on the merits, in so far as" the non-aggravation measure must be "a measure *complementing* more specific measures protecting those same rights"[92]. After concluding that there was an "imminent risk of irreparable prejudice" to the rights in dispute that warranted an order of specific provisional measures, the Court found that, in light of its grant of specific measures, it could also indicate *"complementary"* non-aggravation measures[93]. The Court again confirmed the "complementary" character of non-aggravation measures in its July 2018 Provisional Measures

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[90] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 16, para. 49.

[91] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 16, para. 50.

[92] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21, para. 62; emphasis added.

[93] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 26, para. 83; emphasis added.

Order in this proceeding by stating that the Court could indicate non-aggravation measures "[w]hen it is indicating provisional measures for the purpose of preserving specific rights"[94].

9. The Court's insistence that it will issue non-aggravation orders only to complement specific measures granted on the settled criteria follows from the very character of its Article 41 authority. "Non-aggravation", standing alone, is both lacking in content and circular. As the Court's jurisprudence makes clear, it is only when tethered to specific rights — namely, the rights in dispute between the parties — that non-aggravation gains content.

10. By definition, a request for provisional measures entails a contention by one party that the adverse party *is aggravating* the dispute, and the question is whether the circumstances justify the Court in ordering that party to cease. And the Court has made clear just what circumstances it requires: satisfaction of the Article 41 criteria of prima facie jurisdiction, the plausibility of the right asserted, a link to the measure requested, and the imminent risk of irreparable harm.

11. In short, the UAE may not evade the requirements for the exercise of the Court's authority under Article 41 by basing its Request on non-aggravation alone. As I will now demonstrate, tested against the settled criteria for the indication of provisional measures under Article 41, the UAE's second, third and fourth requested measures must be denied. That result follows as well with respect to the first measure, to the extent the UAE now argues that it should also be granted on the general basis of non-aggravation. But as Mr. Martin has just demonstrated, the UAE cannot meet the settled criteria with respect to that measure either.

B. Application of the settled criteria demonstrates that the UAE's second, third and fourth measures must fail

12. In its Request, the UAE did not even attempt to justify its requested measures by reference to the settled Article 41 criteria. That was fatal to the Request as filed. Yesterday, the UAE finally touched on some of the criteria, but ignored others. So, I turn to applying the Article 41 criteria to the UAE's remaining requested measures, based on the rights the UAE actually appears to be asserting in its Request and yesterday.

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[94] *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, I.C.J. Reports 2018 (II),* p. 26, para. 76 (citing *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. 139, para. 103).

13. *First*, I will apply the criteria of plausibility, link, and urgency to the second and third requested measures. *Second*, I will demonstrate that even to the extent that the UAE relies on a supposed right to non-aggravation, these requests equally fail because the underlying facts make clear that the alleged conduct cannot constitute aggravation of the dispute. *Finally*, I will address the fourth requested measure.

1. Second measure

14. The UAE accuses Qatar of "hampering the UAE's attempts to assist Qatari citizens", of "actually sabotaging the UAE's efforts to assist Qatari nationals", and of "intentionally undermining the UAE's efforts to provide Qatari nationals with a procedure to access the UAE and, for example, exercise their rights before the UAE's courts"[95]. On that basis, the UAE requests the Court to order that "Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens", but it identifies just one basis for its inflammatory allegations: its allegation that Qatar is "blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE"[96].

The PRESIDENT: Ms Amirfar, may I please ask you to slow down a little bit to allow the interpreters to follow your presentation.

Ms AMIRFAR: Of course, Mr. President.

The PRESIDENT: Thank you.

Ms AMIRFAR: Thank you.

15. I pause here to observe how remarkable the UAE's accusation is. The UAE effectively contends that Qatar is acting to perpetuate the very harm to Qataris that caused Qatar to bring these proceedings, and seek an order of provisional measures, to prevent.

[95] RPMUAE, p. 22, para. 51.

[96] RPMUAE, p. 33, para. 74 (ii).

16. Qatar adamantly rejects that contention. I will explain in a moment the threat to security and privacy that made it necessary for Qatar to suspend the operation of the website in its territory to *protect* Qataris' confidential data from cyber hacks or violations of privacy rights.

17. But I would first propose to address the UAE's allegation on its own terms. The Court can only exercise its powers under Article 41 if, first, the rights the requesting party asserts are plausible and, second, that it is "plausible that [the] acts [complained of] constitute offences" vis-a-vis those rights[97]. There must also be a link between the measures requested and the rights invoked. Here, there is simply no way that the UAE can cast its complaint as an attempt to preserve rights plausibly protected by the CERD in order to ensure the Court's capacity, by final judgment, to vindicate those rights.

18. The UAE contends that the website is part of an immigration "system" for Qataris, as well as a means of mitigating the harm — or, in the UAE's words, "minimize the inconvenience" — that the UAE has intentionally visited upon the Qatari people as a means of coercing the Qatari State, an intention it repeatedly confirms in the Request itself[98]. Contrary to what the UAE argued yesterday, Qatar's evidence as set forth in its recent Memorial makes clear that this "system" — of which the visa application website is one part — is, at its root, a "security channel" operated on a discriminatory and arbitrary basis *perpetuating* the harm that the UAE has already caused by its simultaneous collective expulsion of Qataris and ban on Qatari entry into the UAE[99]. Indeed, the immigration "system" is itself a violation of the CERD.

19. So what the UAE asks the Court to do in the guise of provisional measures is to legitimate or justify an aspect of the "immigration" system that Qatar claims violates the CERD. To state the obvious, the UAE has no basis in law or fact to seek provisional measures to protect rights flowing from the CERD when the actions it seeks to protect are actions that Qatar claims actually violate the CERD.

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[97] *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. 131, para. 74.

[98] See e.g. RPMUAE, pp. 7, 9, 10, paras. 15, 20.

[99] MQ, paras. 2.32–2.35, 4.41–4.53, 5.72–5.73, 5.90.

20. Put simply, the UAE is not entitled to provisional measures on the basis of its own characterization of the so-called immigration "system" it says is available to Qataris. As the Court well knows, the Parties dispute the nature of this immigration "system". But for present purposes, it suffices to say that the right the UAE asserts, even accepting its own characterization of the website, constitutes, at most, a supposed right to mitigate its own liability. Whether the website has successfully done so — or whether it has instead perpetuated harms to Qataris — goes to the degree of harm with which the UAE may ultimately be held responsible if Qatar succeeds on its claims. This is plainly a question for the merits, not a right to be protected by provisional measures.

21. The UAE's reliance on the Court's Order in *Frontier Disputes* is thus misplaced. There, the Court ordered measures aimed at preventing the "destruction of evidence material to the Chamber's eventual decision" through the continuation of armed activities within the disputed territory[100] — the territory itself being, of course, the subject of the underlying dispute. Thus the Court's order addressed the potential *destruction* of *existing* evidence material to the dispute on the merits.

22. Despite Professor Sarooshi's attempt yesterday to characterize it as an issue of the "right to present and rebut evidence", the UAE does not seek to preserve evidence here. To the contrary, the UAE asks the Court to direct the future conduct of the Parties on the very matters that give rise to the dispute — and in a manner that assumes that the UAE is right. Professor Sarooshi gives away the game when he accuses Qatar of "manipulating and fabricating evidence"[101], which he appears to base entirely on the incredible statement that "[i]t is Qatar's act in blocking access to the visa website that is . . . preventing Qatari citizens from re-entering the country"[102], and his speculation that in support of its claims, "[i]nevitably, Qatar will . . . cite as evidence a number of examples of Qatari citizens who were previously UAE residents but who upon leaving the country have not subsequently been able to return"[103] as a result of the blocked website.

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[100] *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 9, para. 20; pp. 11-12, para. 32.

[101] CR 2019/5, p. 38, para. 7 (Sarooshi).

[102] CR 2019/5, p. 43, para. 38 (Sarooshi).

[103] CR 2019/5, p. 43, para. 39 (Sarooshi).

23. As you have already heard from Qatar's Agent, that charge of fabrication is false and offensive — clearly motivated by the UAE's transparent attempt to blame Qatar for the harm that the UAE itself has caused and to distract the Court from the deficiencies of the UAE's own pleadings. But in any event, to the extent that the UAE's untenable case is that harm to Qataris has been caused by Qatar's act in blocking the travel website over the last *three months* and not the UAE's conduct over the last *two years*, these are issues that the UAE may argue and the Court will determine at the merits stage.

24. The very same confusion applies to the UAE's contention that it has a "right to comply" with the Court's July 2018 Provisional Measures Order. Not to quibble, but the UAE has an *obligation* to comply with the Court's Order. And again, if the UAE believes that Qatar has interfered with its ability to comply, it can raise that issue on the merits.

25. The same analysis applies to the UAE's attempt to invoke its "due process" rights. A new label cannot rescue the same old arguments. No harm is done to the UAE's due process rights by deferring what are clearly merits issues to the merits phase.

26. Finally, it follows that the UAE's allegations raise no risk of irreparable harm. The UAE effectively asks the Court to use the modality of a request for provisional measures to make an evidentiary assessment on issues on which there has not yet even been a full exchange of written submissions, let alone an oral hearing at which the evidence will be proffered and discussed. That, plainly, is not the stuff of which provisional measures are made.

27. Having addressed why the UAE's allegations in support of its second requested measure cannot meet the Court's settled criteria, I will now explain why the underlying facts make clear that the suspension of the website also cannot constitute an aggravation of the dispute.

28. Specifically, since 5 June 2017, Qatar has taken steps to identify any websites emanating from the UAE Government that could pose security and privacy risks to the Qatari Government or Qataris in Qatar's territory, and to mitigate any harm that may be caused by a security breach[104]. Yesterday, Professor Volterra referred to the security and privacy risks as "technical IT jargon", and made explicit the UAE's great hope that the Court will thus "disregard" words such as

[104] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), pp. 1-2, paras. 1-6.

"hacking" and "malware"[105]. Qatar does not share the UAE's apparent belief that the Court will ignore such "technical" terms, as they relate, after all, to the profound security vulnerabilities in the UAE's own network of websites and therefore go to the basic underlying point: can provisional measures be indicated to prevent a sovereign from protecting its nationals from cyberattacks that will not have any effect on the capacity of the Court to render final judgment on the issues in dispute in this case? The answer must be no, and the answer cannot change just because the UAE has seen fit to frame its request based on a conclusory invocation of the general principle of non-aggravation.

29. Qatar's Communications Regulatory Authority — what I will refer to as the "CRA" — and the Cyber Security Sector within the Ministry of Transportation and Communication are mandated to "identify and mitigate" website vulnerabilities that "could compromise the safety and integrity of sensitive personal data of Qataris"[106]. This focus was not prompted by the dispute related to the CERD, as was suggested yesterday[107], but in response to the larger context of the UAE's actions related to the internet. What the CRA actually says in its letter, which is available at tab 1 in your folders, is that "[p]articularly since the start of the political crisis with the UAE in June 2017, and in light of the UAE's known cyber capabilities and history of cyber operations, especially those that breach privacy rights", the CRA, in co-ordination with the Cyber Security Sector and other relevant Government entities, has taken steps specifically to monitor, identify and mitigate any threats from websites emanating from the UAE Government that could pose security risks to the Qatari Government or Qataris[108].

30. In recent years, Qatar and private Qatari citizens have come under repeated attack on their communication systems by the UAE and agents operating on the UAE's behalf. This included the May 2017 cyberattack on the website of the official news agency of the State of Qatar, Qatar News Agency, by which cybercriminals associated with the UAE infiltrated its electronic

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[105] CR 2019/5, p. 26, para. 40 (Volterra).

[106] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), p. 1, paras. 1-3.

[107] CR 2019/5, p. 39, para. 19 (Sarooshi).

[108] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), p. 2, para. 5.

systems to plant a false news story attributing comments to H.H. the Amir of Qatar that the UAE subsequently used as pretext for its measures against Qatar[109]. Then in August 2018, it was revealed that in 2013, the UAE had used surveillance software of a spyware company to hack into the cellular phones of 159 individuals, including members of the Qatari Royal Family, State officials, and private individuals[110]. More recently, the press has reported that the UAE currently has an offensive cyber operations unit in Abu Dhabi, *specifically tasked* with obtaining sensitive private data from the Apple iPhones of Qatari targets[111]. You can find further information on this point in your tabs.

31. In short, the UAE specifically used and continues to use advanced cyber capabilities to infiltrate communication networks and breach privacy rights. As part of its security check in late fall of 2018, the CRA and Cyber Security Sector discovered that the UAE's website was in breach of basic security protocols[112]. On that basis, the travel website was blocked in Qatar as of January 2019, as a preventive measure to ensure that the security of sensitive Qatari personal data was not breached.

32. I will refrain from going into the detailed information already provided by Qatar to the Court in the CRA's letter of 30 April 2019[113], but generally speaking, I note that three serious

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[109] See Annex 13, Letter from Mohammed bin Abdulrahman Al Thani, Minister for Foreign Affairs of the State of Qatar, to Abdul Latif Bin Rashid Al-Ziyani, Secretary-General of GCC, 7 Aug. 2017 (certified English translation, with unofficial French translation); Annex 2, William Maclean, "Gulf rift reopens as Qatar decries hacked comments by emir", *Reuters*, 23 May 2017; Annex 11, Karen DeYoung and Ellen Nakashima, "UAE orchestrated hacking of Qatari government sites, sparking regional upheaval, according to U.S. intelligence officials", *The Washington Post*, 16 July 2017, https://www.washingtonpost.com/world/national-security/uae-hacked-qatari-government-sites-sparkingregional-upheaval-according-to-us-intelligence-officials/2017/07/16/00c46e54-698f-11e7-8eb5-cbccc2e7bfbf_story.html (with unofficial French translation).

[110] Annex 22, David D. Kirkpatrick and Azam Ahmed, "Hacking a Prince, an Emir and a Journalist to impress a client", *The New York Times*, 31 Aug. 2018, https://www.nytimes.com/2018/08/31/world/middleeast/_hacking-united-arabemirates-nso-group.html (with unofficial French translation); Annex 23, "UAE 'sought Israeli help' to spy on Qatari, Saudi royals", *The New Arab*, 31 Aug. 2018, https://www.alaraby.co.uk/_english/news/2018/8/31/uae-spiedon-qatari-saudi-royals-with-israeli-help (with unofficial French translation).

[111] Annex 27, Joel Schectman and Christopher Bing, "UAE used cyber super-weapon to spy on iPhones of foes", *Reuters*, 30 Jan. 2019, https://www.reuters.com/investigates/special-report/usa-spying-karma/ (with unofficial French translation); Annex 28, Christopher Bing and Joel Schectman, "Inside the UAE's secret hacking team of American mercenaries", *Reuters*, 30 Jan. 2019, https://www.reuters.com/investi_gates/special-report/usa-spying-raven/ (with unofficial French translation); Annex 32, Joel Schectman and Christopher Bing, "American Hackers Helped UAE Spy on Al Jazeera Chairman, BBC Host", *Reuters*, 1 Apr. 2019, https://www.reuters.com/investigates/special-report/usa-raven-media/ (with unofficial French translation).

[112] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), p. 2.

[113] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), pp. 1-2.

security risks were identified. Now, Professor Volterra suggested yesterday that the Court need not entertain the facts contained in the letter because "at no point . . . does Qatar's own regulator even allege hacking or malware" on the UAE's travel website[114]. But that misses the point, and profoundly so. The UAE's travel website, at the address of echannels.moi.gov.ae, actually has two other web addresses that automatically redirect users to the travel website[115]. And one of those websites that redirect to the travel website, www.echannels.ae, did not have a valid security certificate when the CRA checked in the late fall of 2018[116]. Now, a security certificate secures and encrypts data going back and forth between the server and the user's browser. Without it, the user's information is left vulnerable to hacking as information passes through the shared connection, leaving sensitive personal information at high risk of being lost or stolen.

33. And to cut through what the UAE calls "technical IT jargon", the Court can see the security breach warning that users receive when attempting to access the website, as shown on the slides. The warning tells the user that "attackers might be trying to steal your information" and that the invalid security certificate "may be caused by a misconfiguration or an attacker intercepting your connection"[117]. The security certificate was invalid in the late autumn of 2018. When the CRA checked the website as of the 30 April 2019 date of the letter, a valid security certificate appeared to be in place[118], but when checked again just yesterday, the security certificate is once again invalid, as shown on the slide. And again, the warning says, "This website may be impersonating www.echannels.ae to steal your personal or financial information. This may happen if the website is misconfigured or ***if*** an attacker has compromised your connection." In short, the website is unstable.

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[114] CR 2019/5, p. 27, para. 40 (Volterra).

[115] See echannels.glb.moi.gov.ae and www.echannels.ae.

[116] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), p. 3, para. 10.

[117] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), pp. 3-4.

[118] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), p. 3.

34. Equally, the UAE's suggestion that there is no issue because there was no "malware" detected on the UAE travel website, again misses the point of how transmission of malware between websites actually works. Malware is a term of art that refers to malicious software code specifically designed to disrupt, damage or gain unauthorized access to a computer system and thereby gain access to sensitive user information without the user's knowledge or consent. It is a common tool of cybercriminals. The CRA and Cyber Security Sector detected a "high risk" of security breach because of the presence of "malware" on the server of one of the UAE's primary websites for visa processing *that hosts a link* to the UAE travel website, as depicted in the following screenshot of the detection tool used[119] and as described in the CRA letter. As a result, the UAE travel website is at risk of infection, following a pattern commonly exploited by hackers known as a "Watering Hole" attack — the method of attack that became notorious when it was used to infiltrate the website of the Permanent Court of Arbitration in July 2015[120].

35. The result of the substantial security risks described in the CRA letter is that sensitive Qatari data is subject to a high risk of security breach, meaning that the information is subject to being hacked, sold, used and manipulated by cybercriminals. In the cyberworld, this is the equivalent of leaving the house keys in the front door lock. Qatar's actions in suspending the UAE's travel website in its current, insecure configuration are justified by Qatar's prerogative to protect the privacy and cybersecurity of its nationals, and cannot support the UAE's conclusory assertion of aggravation.

36. Indeed, the UAE's claim of aggravation of the dispute is belied by its own conduct. As already mentioned by my colleagues, Qatar can restore access to the travel website if the security risks it identified are remedied by the UAE taking the steps detailed in paragraph 15 of the letter. To date, the UAE has declined to do so. It cannot thereby complain to the Court of the aggravation of a problem that it has itself created and is declining to resolve.

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[119] Annex 33, Letter from the President of the Communications Regulatory Authority to His Excellency Dr. Mohammed Abdulaziz Al-Khulaifi, Legal Advisor to His Excellency Deputy Prime Minister and Minister for Foreign Affairs, 30 Apr. 2019 (with unofficial French translation), p. 4, para. 12.

[120] Annex 1, Luke Eric Peterson, "Permanent Court of Arbitration website goes offline, with cyber-security firm contending that security flaw was exploited in concert with China-Philippines arbitration", Investment Arbitration Reporter, 23 July 2015, https://www.iareporter.com/articles/permanent-court-ofarbitration-goes-offline-with-cyber-security-firm-contending-that-securityflaw-was-exploited-in-lead-up-to-china-philippines-arbitration/ (with unofficial French translation).

2. Third measure

37. I now turn to the third requested measure: that Qatar "stop its national bodies and its State-owned, controlled and funded media outlets from . . . disseminating false statements and accusations regarding the UAE and the issues in dispute". This request thus contains two parts: it seeks to silence both Qatari media and "national bodies" or "national institutions", by which the UAE appears to mean the National Human Rights Committee (or NHRC)[121].

38. With respect to the first part, let us pause for a moment to consider what the UAE is actually asking. The UAE cites to press articles issued by five media outlets as evidence of the act that is ostensibly harming its rights: *The Peninsula*, *Qatar Tribune*, *Gulf Times*, *Al-Watan*, and Al Jazeera. Yesterday, the UAE claimed a right to be free from "reputational harm", "false news" and "defamation". This is extraordinary, and made even more so by the substance of the press articles the UAE *says* violates its rights. The specific articles the UAE identifies are reporting by Qatari media on the public statements of independent human rights observers such as Amnesty International[122], the Special Rapporteur on the right to education[123] and the NHRC and its Chairman[124], that detail the UAE's violations of Qataris' rights. These statements were made at public events — at sideline meetings of the Human Rights Council[125], on academic panels[126], and at press conferences[127] — and they form part of the international public discourse about the UAE's actions. Many of the points discussed in the articles are, in fact, the very points that are at issue — in public hearings — before this Court. Though it would not matter if it had been, none of this content has been created by the Qatari State or by private Qatari media entities the UAE wrongly tries to portray as subject to the control and censorship of Qatar. Indeed, the UAE seems particularly concerned by reporting that it is conducting a "siege"[128]. That *is not* "defamation"; the UAE has joined with three other States, as it has readily confirmed to this Court, to deliberately

[121] RPMUAE, pp. 23-24, para. 53.

[122] RPMUAE, Annex 18.

[123] RPMUAE, Annex 25.

[124] RPMUAE, Annexes 18-19; 23-29.

[125] RPMUAE, Annex 23.

[126] RPMUAE, Annexes 24, 25.

[127] RPMUAE, Annexes 27, 28.

[128] RPMUAE, p. 22, para. 52.

attempt to isolate Qatar and Qataris. In these circumstances, the use of the word "siege" by the media is unsurprising.

39. It is wholly implausible — indeed, it is absurd — to contend that the censorship the UAE is suggesting in the guise of provisional measures is in furtherance of protecting rights under the CERD or within the scope of any dispute regarding the interpretation and application of the CERD. The UAE's "reputation" is not protected by the CERD or any other instrument before the Court, whether the UAE casts the speech to which it objects as "defamation" or anything else. What the CERD does protect against is the kind of State action — exemplified by the UAE's anti-sympathy law[129] — that imposes restraints on freedom of opinion and expression on a discriminatory basis — in other words, the kind of conduct underlying several of Qatar's claims against the UAE in this proceeding, including the UAE's blocking of Qatari media[130]. Examined in the round, the UAE's third request is simply a continuation of the UAE's campaign to silence criticism of its action against Qatar and Qataris and to suppress support for Qatar and Qataris.

40. By asking the Court to order provisional measures that are designed, on their face, to stifle free expression and a free press, the UAE seeks nothing less than to enlist the Court in that discreditable campaign. In these circumstances, there can be no link between any protected right and the measure requested.

41. The UAE's request that the Court order Qatar to silence the NHRC is equally objectionable, for the same reasons. Qatar's NHRC is an independent national human rights body accredited with an "A" rating for its independence and efficacy by third-party human rights monitor, the Global Alliance of National Human Rights Institutions[131]. The "A" status, of course, means that the NHRC is "fully compliant with the Paris Principles"[132], meaning, among other things, that the NHRC has demonstrated its pluralism, competence, independence and autonomy from the State of Qatar. Indeed, the NHRC's independence from Qatar is *required* by the

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[129] MQ, Chap. V, Sec. IV.

[130] CERD, Art. 5 (d) (viii).

[131] Annex 31, "Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions, Accreditation status as of 04 March 2019", GANHRI, 2019, https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20(04%20March%202019.pdf (with unofficial French translation), p. 3; see also Annex 34, "OHCHR and NHRIs", OHCHR https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx (with unofficial French translation).

[132] Annex 31, pp. 1, 3.

Paris Principles, because without such independence, the NHRC could not competently fulfil its mandate to promote and protect human rights in Qatar[133]. Likewise, Qatar cannot interfere with the NHRC's activities. The UAE's incorrect assertions yesterday that Qatar produced or controlled the NHRC's report on the UAE's discriminatory conduct after the Court's Provisional Measures Order[134] fundamentally and — I think — purposely misstates *both* the role of the NHRC as an independent national human rights body and the basis for Qatar's evidence, which is detailed in its Memorial[135].

42. Consistent with its human rights mission, the NHRC has been vocal nationally and internationally about the human rights impacts of the UAE's discriminatory measures. The UAE has no "right" to be free from that kind of independent criticism, and its third requested measure engages no remotely plausible right. Indeed, the UAE's third requested measure would put the Court in the position of ordering Qatar to compromise the independent status of its national human rights body, which is again an untenable proposition.

43. Likewise, the criticism from both the media outlets and the NHRC to which the UAE objects poses no *real and imminent risk* of irreparable harm pending the decision on the merits. The UAE's bold assertion that the NHRC has "arrogated this Court's fact-finding function" and "caused the UAE to suffer the same significant reputational harm as if Qatar's allegations had actually been established by this Court"[136] is simply not credible. Qatar has confidence in the Court's ability to determine the dispute on the basis of the evidence actually before it. Thus for the same reasons I have just described, this aspect of the third requested measure, too, fails in view of the settled criteria of plausibility, link and irreparable harm.

44. Before moving to the fourth requested measure, I make a final, more general point. The notion that the UAE's asserted right to non-aggravation could be breached by the daily work of news outlets or human rights monitors is a notion that the Court should flatly and soundly reject.

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[133] Paris Principles relating to the Status of National Institutions (The Paris Principles), https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.

[134] CR 2019/5, pp. 45-49, paras. 5-18; p. 51, para. 25 (Fogdestam-Agius).

[135] MQ, pp. 13-16, paras. 1.35-1.38.

[136] CR 2019/5, p. 52, para. 29 (Fogdestam-Agius).

International law is not offended by the exercise of press freedom or efforts to protect human rights; rather, it welcomes them.

3. Fourth measure

45. In turning the fourth measure, I point out a final, fundamental defect that applies across the board to the UAE's second, third and fourth requests. While it was not clear in its Request, yesterday the UAE took the position that its Request for provisional measures is premised on Qatar's breach of rights that it contends were conferred on the UAE by the Court's July 2018 Order. It took that position most squarely in support of the fourth requested measure[137].

46. Simply put, a provisional measure is not an enforcement tool for another provisional measure. To be sure, an order of provisional measures engages the restrained party's international responsibility, and that party may be held liable for its violation[138]. But the claim that a party has violated an international obligation in the form of its duty to comply with a provisional measures order of the Court is a matter for the *merits phase*, not a request for provisional measures. In its Memorial, Qatar has demonstrated that it is the UAE that has violated the Court's July 2018 Order. Qatar has, in accord with standard procedure, asked that that claim be taken up at the merits phase. If the UAE actually believes that any of Qatar's conduct since the issuance of the Court's Order violates that Order, it may respond to that effect in the merits phase. What it may *not* do is ask that any such contentions be adjudicated in the guise of a request for "additional" provisional measures.

47. In closing, I need make just two further points about the fourth measure requested by the UAE. *First*, pursuant to the Court's jurisprudence, which I discussed at the outset of my presentation, a general non-aggravation measure is not available absent specific measures to protect rights in dispute. As there is no basis for any of the specific measures requested, there is no possibility of a general non-aggravation measure. *Second*, there is already a non-aggravation measure in force in these proceedings that binds both Parties. The UAE's allegations do not affect that measure. The request for an identical measure is thus without object.

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[137] CR 2019/5, p. 54, para. 3 (Volterra).

[138] See also *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 (I)*, p. 230, para. 452; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 713, para. 126.

48. For all these reasons, each of the second, third and fourth measures requested by the UAE is clearly unwarranted, in light of, first, the Court's jurisprudence related to non-aggravation; second, the settled criteria for provisional measures under Article 41; and third, the facts before the Court.

49. Mr. President, distinguished Members of the Court, that concludes my observations before you this morning. May I ask that you call Professor Klein to the podium? Thank you.

Le PRESIDENT : Je remercie Mme Amirfar. Je donne à présent la parole au professeur Klein. Vous avez la parole, Monsieur.

M. KLEIN : Je vous remercie, Monsieur le président.

V. LES MESURES SOLLICITÉES PAR LES EMIRATS ARABES UNIS RISQUENT DE CAUSER UN PRÉJUDICE DISPROPORTIONNÉ AU QATAR

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un honneur pour moi de présenter le dernier volet de l'argumentation de l'Etat du Qatar ce matin. Il existe une dernière raison pour laquelle les mesures sollicitées par les Emirats arabes unis ne peuvent être acceptées. Cette raison, c'est le préjudice disproportionné qu'elles causeraient à l'Etat du Qatar, même si l'on pouvait considérer — *quod non*, vous l'aurez compris — que toutes les autres conditions requises pour l'indication de ces mesures étaient réunies. Nos contradicteurs semblent avoir perdu de vue que, dans une procédure en indication de mesures conservatoires, ce ne sont pas seulement les droits de l'Etat qui sollicite de telles mesures qui sont en cause, mais tout autant ceux de l'autre partie à l'instance. Vous l'avez rappelé très clairement, et très systématiquement : «Le pouvoir d'indiquer des mesures conservatoires que la Cour tient de l'article 41 de son Statut a pour objet de sauvegarder, dans l'attente de sa décision sur le fond de l'affaire, les droits revendiqués par chacune des parties.»[139] Pas «les droits revendiqués par l'Etat qui demande les mesures conservatoires», mais «les droits revendiqués par chacune des parties». C'est difficile d'être plus clair, et il s'agit donc pour la Cour de s'assurer qu'aucune des Parties ne se trouve placée dans une

[139] *Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie), mesures conservatoires, ordonnance du 3 mars 2014, C.I.J. Recueil 2014*, p. 152, par. 22 ; voir aussi, entre autres, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I)*, p. 18, par. 53.

situation de désavantage dans le cadre de cette procédure[140]. La Cour l'a d'ailleurs rappelé très récemment, dans son ordonnance du 3 octobre 2018 dans l'affaire relative à des *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955*, où elle a pris le soin de mentionner que «[l]'indication … de mesures conservatoires répondant à des besoins humanitaires ne causerait de préjudice irréparable à aucun des droits invoqués par les Etats-Unis»[141]. Et c'est là une considération qui avait déjà fait l'objet d'une attention toute particulière de plusieurs membres de la Cour dans des procédures antérieures[142].

2. La même préoccupation se retrouve dans la pratique d'autres juridictions internationales, comme le Tribunal international du droit de la mer, par exemple. Dans l'affaire de la *Délimitation maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique*, la Chambre spéciale a refusé d'indiquer plusieurs des mesures conservatoires sollicitées par la Côte d'Ivoire parce qu'une ordonnance indiquant de telles mesures «porterait atteinte aux droits revendiqués par le Ghana et créerait pour lui une charge excessive»[143]. Que ce soit à Hambourg, à La Haye, ou ailleurs encore, le souci est le même : ne pas léser irrémédiablement l'une des parties à l'instance en accordant à l'autre des mesures censées protéger ses droits[144]. Ce n'est finalement là qu'un reflet du principe d'égalité entre les parties à l'instance[145], un principe dont nos contradicteurs n'ont pas manqué de vous rappeler l'importance dans le contexte de la présente procédure.

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[140] K. Oellers-Frahm, commentaire de l'article 41, *in* Andreas Zimmermann *et al.*, *The Statute of the International Court of Justic*e, 3e éd., Oxford, OUP, 2019, p. 1145, par. 20 ; voir aussi, entre autres, R. Kolb, *The International Court of Justice*, Oxford/Portland, Hart Publishing, 2013, p. 614.

[141] *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 octobre 2018,* par. 94.

[142] Voir en particulier *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, opinion individuelle de M. le juge Abraham, p. 138-139, par. 6 ; *Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie), mesures conservatoires, ordonnance du 3 mars 2014, C.I.J. Recueil 2014*, opinion dissidente de M. le juge Greenwood, p. 197, par. 7 ; *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017*, déclaration de M. le juge Tomka, p. 152, par. 6.

[143] *Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique (Ghana c. Côte d'Ivoire), ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 164, par. 100 ; voir aussi *Incident de l'«Enrica Lexie» (Italie c. Inde), ordonnance du 24 août 2015, TIDM Recueil 2015*, par. 106 et 107.

[144] Voir encore, pour une illustration récente dans la jurisprudence arbitrale, *The Enrica Lexie Incident (Italy* v. *India)*, Order of 29 April 2016, par. 102, 105 et 106 ; voir aussi entre autres *Sergei Paushok et al.* v. *Mongolia*, Order of 2 September 2008, par. 79.

[145] Voir notamment sur ce point K. Oellers-Frahm, *loc. cit.*, par. 20 ; R. Kolb, *op. cit.*, p. 620 et Jerzy Sztucki, *Interim Measures in The Hague Court*, Deventer, Kluwer, 1983, p. 70.

3. L'image qui vient inévitablement à l'esprit quand on lit les passages que je viens de citer, c'est celle des balances de la justice. Et cela nous conduit à nous poser la question suivante : ces balances se trouveraient-elles à un point d'équilibre si les mesures sollicitées par les Emirats arabes unis étaient indiquées par la Cour ? C'est cet exercice que je voudrais vous inviter à faire maintenant ensemble, très concrètement, pour chacune des mesures demandées par les Emirats.

4. La première d'entre elles tend au retrait immédiat par le Qatar de la communication qu'il a soumise au Comité pour l'élimination de la discrimination raciale en date du 8 mars 2018 et à l'adoption de toutes les mesures nécessaires pour qu'il soit mis fin à l'examen de cette communication par le Comité. Le déséquilibre entre les plateaux de la balance est ici flagrant. Pour une raison très simple : les Emirats arabes unis ne peuvent en l'espèce se prévaloir d'aucun droit qui serait violé en conséquence de la décision du Qatar d'engager une procédure à la fois devant le Comité et devant la Cour. Mes collègues l'ont montré de façon détaillée plus tôt ce matin et je n'y reviendrai donc pas.

5. Je ferai simplement remarquer que, dans l'autre plateau de la balance, il y a un droit très réel et concret du Qatar qui se trouverait mis en cause si les Emirats arabes unis devaient l'emporter sur ce point. Ce droit, c'est celui qui est reconnu à tout Etat de mettre en œuvre les procédures de règlement pacifique des différends qui lui paraissent les plus appropriées pour remédier aux violations du droit international dont il est victime, directement ou dans la personne de ses ressortissants. Plus spécifiquement, comme mes collègues l'ont rappelé également, l'article 16 de la convention internationale sur l'élimination de toutes les formes de discrimination raciale reconnaît expressément aux Etats parties le droit de prendre des mesures pour le règlement des différends relatifs à la convention dans le cadre de procédures distinctes. Autant le droit revendiqué par les Emirats arabes unis dans le cadre de cette première mesure s'avère évanescent, autant celui du Qatar auquel l'indication de cette mesure porterait atteinte se révèle, quant à lui, bien réel. Et il ne fait aucun doute que le préjudice causé au Qatar dans cette hypothèse constituerait bien un préjudice disproportionné, et même irréparable puisque toute possibilité de mettre en œuvre les mécanismes prévus par la convention et de bénéficier de l'action de la commission de conciliation serait alors irrémédiablement compromise.

6. Le déséquilibre entre les plateaux de la balance est tout aussi manifeste en ce qui concerne la deuxième mesure sollicitée par la Partie adverse. Cette deuxième mesure tend, pour rappel, à ce que le Qatar se voie imposer d'arrêter immédiatement de faire obstacle aux efforts des Emirats arabes unis en vue de prêter assistance aux ressortissants qatariens, y compris en débloquant l'accès au site Internet via lequel les citoyens qatariens peuvent solliciter une autorisation pour retourner aux Emirats. Comme mes collègues l'ont exposé également, il n'y a pas non plus ici de droit des Emirats arabes unis qui soit en cause — tout au plus une allégation que le Qatar ne respecte pas les mesures indiquées par la Cour dans son ordonnance du 23 juillet 2018. Il importe peu que cette allégation soit désormais présentée, ainsi que l'a fait hier le professeur Sarooshi, comme découlant du droit qu'auraient les Emirats de prendre les mesures requises pour l'exécution de cette ordonnance[146]. C'est là une question substantielle de conformité avec les nouvelles obligations liant les Parties depuis l'ordonnance du 23 juillet 2018, obligations distinctes des droits en cause sur le fond et qui ne sont pas susceptibles d'être protégées par une nouvelle demande en indication de mesures conservatoires, sous peine de voir la Cour continuellement saisie de telles demandes.

7. La Cour a toujours veillé, comme la CPJI avant elle, à ne préjuger en rien du fond d'une affaire lorsqu'elle avait à se prononcer sur une demande en indication de mesures conservatoires. Dans l'affaire relative à l'*Usine de Chorzów* (demande en indemnités) déjà, la Cour permanente a rejeté une demande présentée par l'Allemagne comme tendant à obtenir l'indication de mesures conservatoires car cette demande tendait en réalité «à obtenir un jugement provisionnel adjugeant une partie des conclusions» de la requête allemande[147]. Par la suite, la Cour a indiqué à plusieurs reprises qu'elle n'était pas habilitée, dans le cadre de l'examen d'une demande de mesures conservatoires,

> «à conclure définitivement sur les faits ou leur imputabilité et que sa décision doit laisser intact le droit de chacune des Parties de contester les faits allégués contre elle, ainsi que la responsabilité qui lui est imputée quant à ces faits et de faire valoir ses moyens sur le fond»[148].

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[146] CR 2019/5, p. 41, par. 31 (Sarooshi).

[147] *Usine de Chorzów, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12*, p. 10.

[148] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 22, par. 44. Voir aussi *ibid., ordonnance du 13 septembre 1993, C.I.J. Recueil 1993*, p. 347, par. 48.

Ces prononcés mettent on ne peut plus clairement en lumière que la considération de base qui prévaut ici encore, c'est celle d'assurer l'égalité, l'équilibre entre les parties, en l'occurrence dans la possibilité qui leur est reconnue de faire valoir leurs arguments quant au fond du différend. C'est cet équilibre qui serait rompu si la Cour devait accepter d'indiquer la deuxième mesure sollicitée par la Partie adverse.

8. Et à supposer même que l'on puisse examiner néanmoins cette deuxième demande des Emirats arabes unis sous l'angle exclusif des mesures conservatoires, le constat serait le même : l'indication de la mesure sollicitée porterait gravement atteinte aux droits du Qatar. Il vous a été montré en quoi la mesure de blocage du site Internet en question par les autorités qatariennes était justifiée sous l'angle de la cybersécurité. Le droit du Qatar de protéger ses réseaux contre des attaques informatiques et de mettre à l'abri ses ressortissants des risques d'atteintes à leurs données est incontestable. Ce droit se verrait pourtant gravement remis en cause si la Cour venait à ordonner l'arrêt du blocage du site incriminé alors même que celui-ci conserverait sa configuration actuelle. Ici encore, cette atteinte au droit du Qatar ne pourrait être justifiée ni par la nécessité de préserver un droit des Emirats — en l'occurrence inexistant — ni par l'impératif de ne pas créer d'obstacle au règlement du différend, puisque c'est en fin de compte la manière dont les autorités émiraties ont choisi de configurer le site en question qui se trouve à la base des difficultés actuelles. Le rapport technique que vous a présenté il y a un instant ma collègue Catherine Amirfar montre au-delà de tout doute que c'est entre les mains des Emirats arabes unis, et non entre celles du Qatar, que se trouve la solution à ce problème. Le préjudice que risqueraient de subir tant l'Etat du Qatar dans l'exercice de sa souveraineté territoriale et de son devoir de protection que les personnes résidant sur son territoire serait ici aussi un préjudice hors de toute proportion avec le bénéfice qu'en retireraient prétendument les Emirats arabes unis, en raison de l'atteinte à la sécurité des réseaux et des données personnelles qui pourrait résulter du libre accès au site dans sa configuration actuelle.

9. La situation n'est pas différente en ce qui concerne la troisième mesure sollicitée par les Emirats arabes unis. Celle-ci tend, je le rappelle, à ce que le Qatar empêche ses institutions nationales et les organes de presse possédés, contrôlés et financés par l'Etat d'aggraver et d'étendre le différend, ainsi que d'en compliquer la résolution, en disséminant ce que nos contradicteurs

appellent de «fausses accusations» concernant les Emirats et les questions en litige devant la Cour. En réalité, ce que la Partie adverse vous demande avec cette troisième mesure, ce n'est rien d'autre que d'ordonner au Qatar de procéder à une censure systématique des prises de position tant d'institutions comme le comité national des droits de l'homme que des médias qatariens qui auraient le mauvais goût de décrire les actions des Emirats arabes unis d'une manière qui n'a pas l'heur de plaire à cet Etat — alors qu'ils se limitent en fait à remplir leur mandat. Et ce n'est, une nouvelle fois, rien d'autre qu'une invitation à vous prononcer dès maintenant sur une question directement rattachée au fond du litige : celle de la persistance — ou non — de comportements des Emirats arabes unis contraires au prescrit de la convention sur l'élimination de la discrimination raciale, qu'il vous faudrait *forcément* trancher avant de pouvoir éventuellement indiquer la troisième mesure sollicitée par la Partie adverse. Ici encore, si la Cour se prononçait dès maintenant sur cette demande des Emirats arabes unis, elle porterait inévitablement atteinte à l'égalité entre les Parties et à leur droit de développer pleinement leurs arguments au fond.

10. Mais à supposer même, une fois encore, que nous envisagions cette question sous l'angle exclusif des mesures conservatoires, que retrouverions-nous dans les deux plateaux de la balance ? D'un côté, la proposition selon laquelle la censure que le Qatar serait invité à exercer permettra d'éviter l'aggravation et l'extension du différend. De l'autre, le droit à la liberté d'expression des médias qatariens et d'une institution qatarienne spécifiquement chargée de la protection des droits de la personne qui sont spécifiquement visés par cette demande. Peut-on sérieusement prétendre que l'indication de cette mesure permettra d'atteindre l'équilibre qu'il revient à la Cour de préserver entre ces impératifs contradictoires dans le cadre d'une procédure en indication de mesures conservatoires ? Il n'en est évidemment rien parce que, une fois encore, la prétention qui sous-tend cette demande des Emirats ne repose sur aucun fondement. Peut-on sérieusement prétendre que ce différend sera en voie d'être réglé plus facilement si le président du comité national des droits de l'homme du Qatar emploie désormais le terme «blocus» pour parler de la situation de son pays, plutôt que le terme «siège», qui paraît particulièrement offensant à la Partie adverse ? Est-il d'ailleurs déraisonnable ou «agressif», pour reprendre le terme utilisé hier par nos

contradicteurs[149], de parler de siège lorsqu'un Etat doit faire face à la rupture des relations diplomatiques, aériennes, maritimes, postales et commerciales de la part de ses voisins immédiats ? Le lien entre la mesure sollicitée par la Partie adverse et son objectif annoncé — la non-aggravation du différend — apparaît, en réalité, inexistant. Par contre, le préjudice qui résulterait, pour le Qatar et pour ses médias, de l'indication d'une telle mesure serait, lui, tout à fait réel et considérable. S'il fallait faire droit à cette demande des Emirats arabes unis, le Qatar devrait en fin de compte se soumettre à ce qui ne serait rien de moins qu'une forme de censure préalable : toutes les déclarations que ses autorités envisagent de faire, tous les articles ou reportages que ses médias envisagent de diffuser devraient être passés au crible afin de s'assurer qu'ils ne contiennent aucune affirmation, aucun terme que les Emirats considéreraient comme problématique — et dès lors susceptible, selon eux, de faire obstacle au règlement du différend.

11. Je serai très bref en ce qui concerne la quatrième mesure sollicitée par la Partie adverse, qui tend à ce que le Qatar s'abstienne de toute action susceptible d'aggraver ou d'étendre le différend ou d'en rendre le règlement plus difficile. Ainsi que mes collègues l'ont rappelé, cette dernière demande est essentiellement sans objet, dès lors que la Cour a déjà imposé, en des termes rigoureusement identiques, cette obligation aux deux Parties dans son ordonnance du 23 juillet 2018 — une obligation dont le Qatar est pleinement conscient et qu'il entend bien continuer à respecter. Je répéterai simplement que si la Cour estimait néanmoins nécessaire de réitérer cette demande, elle devrait alors l'adresser conjointement aux deux Parties afin que l'équilibre inhérent à la procédure en indication de mesures conservatoires soit maintenu.

12. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, vous aurez constaté que nos contradicteurs sont très sensibles au principe de l'égalité des Parties. Mais visiblement cette sensibilité a des limites. Elle est totalement absente dès lors que ce sont les droits de l'autre Partie, en l'occurrence le Qatar, qui sont en cause. Pourtant, autant les atteintes à ce principe d'égalité se révèlent purement fantasmatiques pour ce qui est de la situation des Emirats arabes unis dans la présente procédure, autant ces atteintes seraient bien réelles si les mesures conservatoires sollicitées par la Partie adverse devaient lui être accordées. Pas une seule de ces

[149] CR 2019/5, p. 61, par. 30 (Volterra).

mesures ne passerait le test des balances de la justice. Pas une seule de ces mesures ne satisferait cette exigence fondamentale, dans le cadre d'une procédure en indication de mesures conservatoires, de la sauvegarde des droits revendiqués par *chacune* des Parties dans l'attente d'une décision de la Cour sur le fond de l'affaire. Pour chacune de ces mesures, les plateaux de la balance présenteraient un déséquilibre évident au détriment de l'Etat du Qatar. C'est cette image que je vous invite à garder à l'esprit au moment où vous aurez à vous prononcer sur les demandes qui vous sont soumises aujourd'hui.

13. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, ma présentation concluait le premier tour de plaidoiries de l'Etat du Qatar. Je vous remercie pour votre bienveillante attention.

The PRESIDENT: I thank Professor Klein. Indeed your statement brings to an end the first round of oral observations of the State of Qatar. The Court will meet again tomorrow, 9 May, at 10 a.m. to hear the second round of oral observations of the United Arab Emirates, followed by the second round of oral observations of the State of Qatar at 4.30 p.m. The sitting is adjourned.

The Court rose at 12.55 p.m.