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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2020

Public sitting

held on Monday 31 August 2020, at 3 p.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 2020

Audience publique

tenue le lundi 31 août 2020, à 15 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
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judges *ad hoc*	Cot
		Daudet
	Registrar	Gautier

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

M. Gautier, greffier

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

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

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

Ms Hanadi Al-Shafei, Ministry of Foreign Affairs,

Ms Hessa Al-Dosari, Ministry of Foreign Affairs,

Ms Amna Al-Nasser, 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. Abdulla Al-Mulla, Ministry of Foreign Affairs,

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M. Nasser Al-Hamad, ministère des affaires étrangères,

Mme Hanadi Al-Shafei, ministère des affaires étrangères,

Mme Hessa Al-Dosari, ministère des affaires étrangères,

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comme conseil adjointe.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today and will meet in the coming days to hear by video link the oral arguments of the Parties on the preliminary objections raised by the United Arab Emirates in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*. This afternoon, the Court will hear the United Arab Emirates' first round of oral argument.

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Today's hearing is the second hearing that the Court holds by video link, under Article 59, paragraph 2, of its Rules, in order to continue to discharge its judicial functions, despite the COVID-19 pandemic and the measures taken by various governments to combat it, especially the limitations on international travel, which make it necessary to hold our hearings remotely. While it is, of course, hoped that the situation will soon normalize, thereby enabling the Court to resume the holding of hearings in person, the Court will continue to fulfil its mission through all the means at its disposal should the health crisis continue to persist.

With respect to the hearing starting today, the Court has made every effort to ensure its smooth conduct. However, there are certain inherent difficulties with remote hearings and the connection by video link, as well as remote simultaneous interpretation. In the event that we experience a loss of audio input from the remote participants, I might have to interrupt the hearing briefly to allow the technical team to re-establish the connection.

In view of the unusual circumstances which I have just described, the Court has opted for a mix of physical and virtual presence during the hearing. Therefore, the following judges are present with me in the Great Hall of Justice: Vice-President Xue, Judges Tomka, Abraham, Bennouna, Sebutinde, Gevorgian, Salam and Iwasawa; while Judges Cançado Trindade, Donoghue, Gaja, Bhandari, Robinson and Crawford, as well as Judges *ad hoc* Cot and Daudet, are present with us via video link.

*

I recall that Judges *ad hoc* Cot and Daudet, chosen respectively by the United Arab Emirates and Qatar, have already made their solemn declarations and were both installed as judges *ad hoc* on 27 June 2018, during the phase of the present case that was devoted to the Request for the indication of provisional measures submitted by Qatar.

*

I shall now recall the principal steps of the procedure in the case.

On 11 June 2018, the State of Qatar filed in the Registry of the Court an Application instituting proceedings against the United Arab Emirates with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (which I shall hereinafter refer to as "CERD").

In its Application, Qatar sought to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and Article 22 of CERD.

On 11 June 2018, Qatar also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

By an Order of 23 July 2018, the Court, having heard the Parties, indicated certain provisional measures addressed to the United Arab Emirates. In addition, both Parties were directed to refrain from any action which might aggravate or extend the dispute before the Court.

By an Order dated 25 July 2018, the President of the Court fixed 25 April 2019 and 27 January 2020 as the respective time-limits for the filing of a Memorial by Qatar and of a Counter-Memorial by the United Arab Emirates. The Memorial of Qatar was filed within the time-limit so fixed.

On 22 March 2019, the Government of the United Arab Emirates, relying on Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court, submitted to the Court a Request for the indication of provisional measures in order to preserve "the UAE's procedural rights in this case" and to prevent Qatar from "further aggravating or extending the dispute between the Parties pending a final decision in this case".

By an Order of 14 June 2019, the Court, having heard the Parties, rejected the Request for the indication of provisional measures submitted by the United Arab Emirates.

On 30 April 2019, the United Arab Emirates raised certain preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 2 May 2019, the President of the Court fixed 30 August 2019 as the time-limit within which Qatar could present a written statement of its observations and submissions on the preliminary objections raised by the United Arab Emirates. Qatar filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

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After ascertaining the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings, with the exception of Annexes 163, 165-243, 247-263, 265-271 and Exhibit B of Annex 272 of Qatar's Memorial, and Exhibit A of Annex 272-A of Qatar's Written Statement on the Preliminary Objections of the United Arab Emirates. Further, in accordance with the Court's practice, the pleadings and documents annexed will be put on the Court's website from today.

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I note the presence at the hearing by video link of the Agents, counsel and advocates of both Parties. In accordance with the arrangements for the organization of the proceedings which have been decided by the Court, the hearing will comprise a first and a second round of oral argument. The first round of oral argument will begin today, with the statement of the United Arab Emirates, and will close on Wednesday 2 September 2020, following Qatar's first round of oral pleading. Each Party has been allocated a period of three hours for the first round. The second round of oral arguments will begin in the afternoon of Friday 4 September 2020 and come to a close on the afternoon of Monday 7 September 2020. Each Party will have a maximum of one hour and a half to present its reply. In this first sitting, the United Arab Emirates may, if required, avail itself of a

short extension beyond 6 p.m., in view of the time taken up by the opening part of these proceedings.

I will now give the floor to the Agent of the United Arab Emirates, H.E. Ambassador Hissa Abdullah Ahmed Al-Otaiba. Your Excellency, you have the floor.

Ms AL-OTAIBA: Bismillah al-rahman al-rahim.

1. Mr. President, Madam Vice-President, distinguished Members of the Court, delegation of Qatar, it is an honour and a privilege to appear before the Court today as the Agent for the Government of the United Arab Emirates in this case. My name is Hissa Abdullah Ahmed Al-Otaiba. I serve as the Ambassador of the United Arab Emirates to the Kingdom of the Netherlands.

2. On behalf of the United Arab Emirates Government and our delegation, I wish to express our deepest respect for the Court and our strong and abiding confidence in its role as the principal judicial organ of the United Nations. The resolution of the dispute between the United Arab Emirates and Qatar is an important matter for my Government, and we continue to apply ourselves diplomatically and legally to this task.

3. I would also like to express the United Arab Emirates' appreciation for the Court's efforts to make this hearing possible, and perform steadfastly its task of administering international justice during these challenging times.

4. Mr. President, Members of the Court, you will hear this week the preliminary objections to the jurisdiction of the Court that the United Arab Emirates has raised in respect of the application brought by Qatar under the International Convention on the Elimination of All Forms of Racial Discrimination.

5. The United Arab Emirates' case is grounded in essentially two objections. The first is that the measures that the United Arab Emirates adopted upon severing relations with Qatar do not fall within the scope of application of the CERD. The second concerns Qatar's recourse to the procedures before the CERD Committee and Conciliation Commission, and the relevance of this for purposes of Article 22 of the CERD.

6. You will also hear, mostly in voices from Abu Dhabi, about the important context to the present case and the United Arab Emirates' perspective on this dispute going forward.

7. Mr. President, Members of the Court, I have already provided you with a list of all the members in the United Arab Emirates' delegation. The following representatives and counsel will present submissions on behalf of my Government during this week of hearings.

8. Ambassador Abdalla ***AlNaqbi***, who is Director of the International Law Department of the Ministry of Foreign Affairs. Ambassador ***AlNaqbi*** will address you on the context of the dispute with Qatar.

9. Ms Lubna Qassim ***Al Bastaki***, who is the United Arab Emirates' Deputy Permanent Representative to the United Nations in Geneva. Ms ***Al Bastaki*** will provide the Court with further context about the measures that are the subject of Qatar's claims in these proceedings.

10. Sir Daniel Bethlehem, who is well known to the Court, will make general observations to frame the UAE's preliminary objections. He will also address the UAE's preliminary objection on the scope *ratione materiae* of the CERD.

11. Dr. Scott Sheeran is the Senior Legal Advisor to the Minister of State for Foreign Affairs. He will explain to the Court why none of the measures adopted by the United Arab Emirates falls within the scope of application of the CERD.

12. Last, Professor Mathias Forteau, who is also well known to the Court, will address the jurisdictional objection based on the procedural preconditions of Article 22 of the CERD.

13. Mr. President, Members of the Court, having concluded my introductory remarks, I would be grateful if you could call Ambassador ***AlNaqbi*** to present to the Court.

14. Thank you, Mr. President, and distinguished Members of the Court.

The PRESIDENT: I thank the Agent of the United Arab Emirates for her statement. I now invite H.E. Ambassador Abdalla ***AlNaqbi*** to take the floor. You have the floor, Sir.

Mr. ***ALNAQBI***:

THE CASE IN CONTEXT — OPENING OBSERVATIONS

1. Mr. President, Members of the Court, it is an honour and a privilege to appear before you today. My name is Abdalla ***AlNaqbi***. I serve my country as Director of the International Law Department at the Ministry of Foreign Affairs and International Cooperation in Abu Dhabi.

2. Mr. President, Members of the Court, the case before you concerns certain measures adopted by the United Arab Emirates, addressed to Qatar and Qatari nationals, which Qatar attempts to frame as in breach of the CERD. These measures ensued from the UAE's decision to terminate relations with Qatar. They have nothing to do with racial discrimination.

3. The UAE takes very seriously its obligations under the CERD. But the CERD is not an "all-purpose" human rights convention. It cannot be invoked and applied beyond its proper scope. My colleagues speaking after me will address you on the reasons why the measures adopted by the United Arab Emirates do not constitute racial discrimination, and thus do not fall within the scope of the Convention. They will also address the UAE's other objection to jurisdiction. I will limit my remarks to providing an overview of the context of the dispute with Qatar.

4. Mr. President, Members of the Court, the UAE and Qatar share historical bonds. Relations and links between our people date back to ancient times. We have lived in the same part of the world since time immemorial and share a common ancestry, heritage and culture. Qatari citizens are members of our families and UAE citizens are members of Qatari families. We are the same people, albeit with different nationalities.

5. At the end of the 1960s, when the British announced their intention to end the protectorate arrangements with the Trucial States, negotiations were held among various emirates to establish a federation. Qatar was invited to join the Union that eventually became the United Arab Emirates. This was in recognition of the commonalities between our people. About 10 years later, the commonalities between us were the basis for the establishment of the Gulf Cooperation Council, made up of the UAE, Qatar, Bahrain, Kuwait, Oman and Saudi Arabia. The preamble of the

GCC Charter of 1981 emphasizes "the ties of special relations, common characteristics and similar systems" of the six member States and their people[1].

6. In light of this, when confronted with the grave threat brought about by Qatar's posture towards terrorism and extremism, the UAE tried to find an agreed solution. Alongside other governments in our region, we turned to Qatar to persuade it to step away from the course it had embraced. We did so through dialogue and negotiation, in the hope that our common interest in a stable, prosperous and secure region would prevail over ambitions and ideologies.

7. This process included the conclusion of three specific regional agreements, the Riyadh Agreements, that were meant to chart a new course and inject new energies and additional commitment to the vital cause of fighting terrorism and extremism[2]. The UAE thereafter engaged at length with Qatar in the context of the mechanisms provided by the Riyadh Agreements to try and address in a conciliatory manner our grievances resulting from Qatar's non-compliance with its obligations under the Agreements.

8. I cannot emphasize enough the hope that the UAE placed in this process and our dismay when Qatar, after four years of active diplomatic engagement on our part and the conclusion of three international agreements, signalled its intention to repudiate these agreements[3].

9. Mr. President, Members of the Court, the severing of relations is a sovereign right, and at the juncture at which we found ourselves in 2017, it was necessary to exercise this right[4]. We have legitimate national security concerns over Qatar's conduct[5]. They are serious concerns and we would like to see them addressed by Qatar, before we restore the privileges of friendship.

10. Despite the seriousness of the situation, severing relations with Qatar and adopting the measures ensuing from it, was a difficult decision. We understand that Qataris have been affected

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[1] Charter of the Gulf Cooperation Council, 25 May 1981, preamble.

[2] Preliminary Objections of the United Arab Emirates (POUAE), Vol. II, Ann. 1: Riyadh Agreement, 23 and 24 Nov. 2013, United Nations Registration No. 68881; POUAE, Vol. II, Ann. 2: Mechanism Implementing the Riyadh Agreement, 17 Apr. 2014, United Nations Registration No. 68882; POUAE, Vol. II, Ann. 3: Supplementary Riyadh Agreement, 16 Nov. 2014, United Nations Registration No. 68883.

[3] Letter of 19 Feb. 2017 from the Minister for Foreign Affairs of the State of Qatar to the Secretary-General of the GCC, *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar)*, Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates, 27 Dec. 2018, Vol. V, Ann. 72.

[4] POUAE, Vol. III, Ann. 56: Declaration of the United Arab Emirates, 5 June 2017.

[5] *Ibid.*

by our decision to cut ties with Qatar. It often happens that disputes among States have a certain impact on their nationals. As I can assure you, however, this has nothing to do with racial discrimination.

11. Mr. President, Members of the Court, we are also aware that there were imperfections in the way the severance of relations was implemented at the outset. This was and remains an unprecedented situation of emergency for the UAE, never experienced before in its life as a nation.

12. Where we have identified shortcomings with the measures, we have addressed them. Where we have thought it was possible and appropriate to limit the effect of the measures on Qatari nationals, we have done so. For example, upon severing relations, we announced that Qatari citizens should leave the UAE's territory. However, in the end, we took no action to deport or expel Qatari nationals. Similarly, the ban on entry of Qatari nationals that was announced upon severing relations was modified within one week. Qatari nationals are free to enter the UAE, subject only to an application process and security screening. This is not dissimilar to what other countries require in ordinary circumstances — let alone in a case of emergency.

13. The CERD Conciliation Commission, now established, constitutes an opportunity to review further the scope of the measures at issue in these proceedings. We are fully committed to the process before this Commission and we have faith in its capacity to help us at least narrow the dispute between us. The fact that my Government maintains it has not engaged in racial discrimination does not prevent the UAE from being open to conciliation with Qatar. My Government's position is that we will engage in the conciliation proceedings even if the Court finds for the UAE on the basis of nationality.

14. Mr. President, Members of the Court, the involvement of third parties has already assisted us in another context. This is notably the case with respect to the Universal Postal Union (UPU) dispute arising from the UAE's suspension of direct postal relations with Qatar.

15. The dispute remains unresolved, but its landscape has changed very significantly. With the assistance of the UPU, the Parties have agreed on a means to restore indirect postal services, via

Oman. The post is now flowing between the UAE and Qatar, which it did not, before the good offices of the UPU[6].

16. I want to emphasize that the UAE takes no comfort in the current situation. As the Court will have observed from other recent events, the UAE's aspiration as a nation is to be open and to build bridges. Where bridges have fallen, we try to rebuild them. Qataris are our neighbours and we remain tied by bonds of kinship, being brothers and sisters. We would like to see our region whole again, not only people, but also governments. I want to express before you my Government's commitment to resolving this crisis, if reasonableness is shown on both sides, in the interest of a peaceful Middle East. Let me reiterate before you the point made by my Minister of State for Foreign Affairs, speaking to international media just a fortnight ago[7]: the UAE is open to closing the Gulf rift.

17. Mr. President, Members of the Court, this concludes my presentation. With your permission, my colleague Ms Lubna Qassim ***Al Bastaki*** will continue the UAE's submissions. Thank you.

The PRESIDENT: I thank Ambassador ***AlNaqbi*** for his statement. And I give the floor to Ms Lubna Qassim ***Al Bastaki***. You have the floor, Madam.

Ms ***AL BASTAKI***:

THE CONTEXT OF THE UAE MEASURES CHALLENGED BY QATAR

I. Introduction

1. Thank you. Mr. President, Members of the Court, I am honoured to be speaking before you on behalf of my country. My task today, building on Ambassador ***AlNaqbi***'s remarks, is to provide you with some further context about the measures which are the subject of Qatar's claims in these proceedings.

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[6] Universal Postal Union, Statement by the Director General of the Universal Postal Union, "UPU announces resumption of international postal exchanges between Qatar and the following countries: Bahrain, Egypt, Saudi Arabia and the UAE, 25 Feb. 2020, available at: https://www.upu.int/en/Press-Release/2020/2/Statement-by-the-Director-General-of-the-Universal-Postal-Union; Reuters, UAE restores postal service to Qatar despite protracted dispute, 10 Feb. 2020, available at https://www.reuters.com/article/us-gulf-qatar-emirates/uae-restores-postal-service-to-qatar-despite-protracted-dispute-idUSKBN2041JQ.

[7] Bloomberg Politics, "UAE Minister of State says Israeli pact is 'sovereign' decision", 15 Aug. 2020, available at https://www.youtube.com/watch?v=sO6VjasOAAI (minute 9:44).

2. Qatar alleges that, in severing relations, the UAE has engaged in "racial discrimination" against Qataris in violation of the CERD. In particular, Qatar challenges UAE measures that it alleges constitute impermissible discrimination against a protected group under the CERD. As you will hear from Dr. Sheeran, Qatar's case, while masquerading as a case of discrimination on the basis of "national origin", in fact concerns UAE measures that were addressed to Qatari nationals on the sole basis of their nationality. As nationality was both the focus and the effect of the UAE measures, they fall outside the scope of the CERD.

3. I have four points to make in support of the UAE's position. In doing so, for the purposes of proper context, I will address the reach and effect of the measures which Qatar challenges. The character of the UAE measures as focused exclusively on persons of Qatari nationality — and on nationality alone — is plain to see on the face of the measures. It is on this basis that they fall outside the scope of the CERD. As you will hear from Sir Daniel Bethlehem, this issue is properly amenable to preliminary determination at this stage of the proceedings.

II. Qataris and Emiratis do not have a separate "national origin"

4. My first point is that Qataris and Emiratis are united by a common origin but separated by our nationalities. We share a common past, a common language, a common heritage, a common culture, and common traditions. This is clear as a matter of history and as a matter of fact.

5. As Ambassador ***AlNaqbi*** mentioned, Qatar was invited with others, including Bahrain and Oman, based on our commonalities as one people, to join the new Union of the Arab emirates from our region which became the United Arab Emirates. Notwithstanding that these particular emirates chose their own pathway, the fact that we have a common origin which traversed the new national boundaries was understood, including as reflected in the UAE's nationality laws. Under the UAE's law, a national of Qatar, in common with those of Bahrain and Oman, has the ability to become a UAE national more easily than any other nationality in the world[8]. This well illustrates the artificiality of the supposed racial distinctions which Qatar is now seeking to conjure up.

6. While a person born to a Qatari or Emirati father can be a national, Qatari and Emirati nationality can be based in certain instances on other factors, including marriage and naturalization.

[8] Memorial of Qatar (MQ), Vol. II, Ann. 37: United Arab Emirates Federal Law No. 17 of 1972 concerning [Nationality] and Passports (as amended), Article 5 *(a)*.

Thus, Qatari and Emirati nationals may be descendants of tribes and families whose roots pre-date the founding of Qatar and the UAE as independent nations. However, they also may be persons who have no blood ties to these tribes and families.

7. The UAE, in the context of its severance of relations with Qatar, removed preferential treatment previously accorded to Qatari nationals for their travel to the UAE and imposed certain restrictions on Qatari nationals. No measure was taken, intended or effective against any person in any group, however defined, other than the group defined by Qatari nationality.

III. The UAE's travel and residence measures concern Qatari nationality, not "national origin"

8. My second point concerns the scope of the travel measures adopted in June 2017. In terminating diplomatic relations with Qatar, the UAE made clear that its disagreement was not with the Qatari people but with the Qatari Government, stating that "the UAE affirms its full respect and appreciation for the brotherly Qatari people on account of the profound historical, religious and fraternal ties and kin relations binding UAE and Qatari peoples"[9].

9. However, because the UAE considered it necessary to sever relations with Qatar, it asked Qatari diplomats to leave and recalled UAE diplomats from Qatar. Moreover, the UAE announced that it was "[p]reventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons"[10]. This statement was clearly on its face limited to Qatari nationals.

10. I wish to add, for context, that the UAE decided not to implement the portion of its 5 June 2017 announcement by which Qatari nationals were required to leave the UAE. The 5 June 2017 statement did not constitute a legal order for the deportation or expulsion of Qatari nationals. Under UAE law, a person can be deported from UAE territory **only** by an order of the Ministry of the Interior, which in this instance issued no such orders and there was no legal requirement for

[9] POUAE, Vol. III, Ann. 56: Declaration of the United Arab Emirates, 5 June 2017; judges' folder, tab 12.

[10] POUAE, Vol. III, Ann. 56: Declaration of the United Arab Emirates, 5 June 2017; judges' folder, tab 12.

Qatari nationals to leave. There were no expulsions and many Qatari nationals continued their residence in the UAE after 5 June 2017[11].

11. As regards the prohibition of Qatari nationals entering the UAE, this was quickly relaxed. In light of the security concerns underlying the UAE's decision to terminate relations, the UAE established a visa system to govern the entry of Qatari nationals into the UAE, based on neutral criteria and irrespective of race, or of national or ethnic origin. Qatari nationals may and do apply for permission to travel to the UAE through a hotline established on 11 June 2017[12]. The UAE subsequently created a website to support the hotline and promote the efficient processing of entry requests[13]. The application process is open to "all Qatari *citizens*"[14]. A security screening is then conducted, and if successful, the entry and stay as requested by the applicant will be authorized[15]. In this way, Qatar is one of many countries whose nationals must apply for prior permission to enter the UAE[16]. Through this process, the vast majority of Qatari applications have been approved. In 2018, documents on the record indicate that approximately 95.5 per cent of applications for entry were approved[17].

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[11] See POUAE, Vol. II, Ann. 17: The Committee on the Elimination of Racial Discrimination (*State of Qatar* v. *United Arab Emirates*), Response of the United Arab Emirates on the Issues of Jurisdiction and Admissibility to the request made by the State of Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination, 14 Jan. 2019 (with Annexes), Ann. 1 (pp. 256-257), Exh. 11 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 request for the indication of provisional measures.

[12] See POUAE, Vol. III, Ann. 57: UAE MoFAIC, Announcement, Directive for Hotline Addressing Mixed Families (11 June 2017), Exh. 3 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 request for the indication of provisional measures (Part 1: Report of Abu Dhabi Police on Hotline, Real Estate, Funds, Licenses and Immigration, 20 June 2018), p. 2.

[13] See POUAE, Vol. IV, Ann. 155: UAE MoFAIC, Screenshots of Federal Authority for Identity & Citizenship website, Arabic with English translation, *Presentation on the Process of Application*.

[14] See POUAE, Vol. III, Ann. 58: Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation, 5 July 2018 (emphasis added), judges' folder, tab 14.

[15] See Exh. 3 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 request for the indication of provisional measures (Part 1: Report of Abu Dhabi Police on Hotline, Real Estate, Funds, Licenses and Immigration, 20 June 2018), p. 2; POUAE, Vol. IV, Ann. 155: UAE MoFAIC, Screenshots of Federal Authority for Identity & Citizenship website, Arabic with English translation, *Presentation on the Process of Application*.

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

[17] See Exh. 3 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 request for the indication of provisional measures (Part 1: Report of Abu Dhabi Police on Hotline, Real Estate, Funds, Licenses and Immigration, 20 June 2018), p. 2; POUAE, Vol. II, Ann. 17: Committee on the Elimination of Racial Discrimination (*State of Qatar* v. *United Arab Emirates*), Response of the United Arab Emirates on the Issues of Jurisdiction and Admissibility to the request made by the State of Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination, 14 Jan. 2019 (with Annexes), Ann. 1 (pp. 256-257).

12. To preclude any doubts in this regard, on 5 July 2018, the UAE's Ministry of Foreign Affairs issued a statement reaffirming the UAE's long-standing policy on the rights of Qatari nationals to travel to and reside in the UAE and its policy that Qatari nationals may apply for a visa to travel to the UAE[18].

13. Both the focus and the effects of the measures were on Qatari nationals.

IV. There is no UAE "Anti-Sympathy" Law

14. My third topic relates to the so-called "Anti-Sympathy" Law. Qatar claims that Qataris living in the UAE suffer discrimination. Qatar's claim in this regard is based primarily on a Twitter post of the UAE Attorney General and the UAE Cyber-Crime Law[19].

15. The Attorney General's tweet refers to expressing "any sympathy for the State of Qatar or any objection to the position of the UAE or other countries that have taken firm positions against the government of Qatar"[20]. This tweet, which has no legal effect in the UAE, was directed at *Qatar's* support for terrorism and extremism and was not addressed to either Qatari nationals or the nationals of any other State in particular. As for the UAE Cyber-Crime Law, enacted five years before the UAE terminated relations with Qatar, it is a law of general application that in no way targets those of Qatari ancestry or national origin. It is analogous to cyber-crime laws in many other countries, including Qatar's 2014 cyber-crime law[21]. The UAE law prohibits the promotion and incitement of hatred and racism through the internet and electronic communications; it does not discriminate against any group.

V. Qatari websites were not blocked due to their "national origin"

16. Finally, I turn to Qatar's claims that the UAE has violated the Convention by blocking websites of Qatari corporations due to their "national origin". As a preliminary matter, corporations, and their websites, do not come within the scope of the CERD, which addresses natural persons. Corporations may have a nationality, but they do not have a "national origin". This

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[18] POUAE, Vol. III, Ann. 58: Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation, 5 July 2018, judges' folder, tab 14.

[19] MQ, paras. 2.37-2.40.

[20] MQ, para. 2.37 and MQ, Vol. II, Ann. 10, Twitter post, *@MOJ_UAE* (6 June 2017).

[21] UAE Federal Decree Law No. 5 of 2012.

is the jurisdictional point. The factual allegation made by Qatar is incorrect, simply on its face. There are many Qatari corporations that have websites which are accessed from the UAE[22].

17. In respect of the allegations relating to media corporations, the UAE has a regulatory framework for media activities and standards for media content. That framework provides for the establishment, oversight, and enforcement of media standards[23]. The UAE authorities have the mandate to require a media outlet to obtain a license prior to operating in the UAE[24]. All media organizations operating within the UAE must comply with the regulations and rules, and provide the information and data officially requested of them[25].

18. If the UAE authorities determine that the content of a specific website violates the UAE's standards for media content, they issue an instruction to block the site[26]. It is pursuant to this pre-existing regulatory framework that the UAE blocked eight Qatari websites, including websites run by Al Jazeera Media Network and other similar news media sites[27]. In a number of instances, as Qatar itself acknowledges[28], it did so even before the UAE terminated relations with Qatar on 5 June 2017. While the UAE initially blocked the access to eight websites, on 22 July 2017, it reinstated access for one of these websites, after reviewing its initial decision[29].

19. The UAE blocked the Qatari websites for the same reason that it blocks domestic and other foreign websites, for violating its content standards. Such action cannot properly come within the scope of the CERD.

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[22] www.dohabank.com.qa (Doha Bank); www.cbq.qa (Commercial Bank of Qatar); www.qcon.com.qa (Qatar Engineering & Construction Company); www.qp.com.qa (Qatar Petroleum); www.Naseemalrabeeh.com (medical centre in Qatar); www.dig.qa (Doha Insurance Group); www.ounass.qa (retail); www.qatarcement.com (Qatar National Cement Company); www.aamal.com.qa (investment company in Qatar).

[23] Federal Law No. 11 of 2016 on the regulation and powers of the National Media Council, Arts. 4 and 5 (23 May 2016).

[24] Cabinet Decision No. 23 of 2017 on Media Content (4 July 2017); and NMC Chairman's Resolution No. 30 of 2017 on Media Activities Licensing (12 June 2017).

[25] Federal Law No. 11 of 2016, Art. 10.

[26] UAE Telecommunications Regulatory Authority, Regulatory Policy, Internet Access Management (19 April 2017), Art. 3, available at https://www.tra.gov.ae/assets/bd3Jy4Km.pdf.aspx.

[27] POUAE, paras. 20-23 and para. 136.

[28] Application of Qatar (AQ), para. 24; MQ, para. 2.42; see also MQ, Vol. V, Ann. 125, Committee to Project Journalists, "Saudi Arabia, UAE, Bahrain block Qatari news websites" (25 May 2017), https://cpj.org/2017/05/saudi-arabia-uae-bahrain-block-qatari-news-website.

[29] Gulf News, "beIN Sports resumes service in UAE" (22 July 2017), https://gulfnews.com/sport/football/bein-sports-resumes-service-in-uae-1.2062497.

20. Mr. President, Members of the Court, as I come to conclude my submissions, I hope it is clear from what I have said that the UAE measures in issue in these proceedings are indeed focused exclusively on persons of Qatari nationality, and nationality alone. This is plain from the face of the measures and, on this basis, they fall outside the scope of the CERD.

21. Mr. President, Members of the Court, this concludes my speech. Mr. President, may I ask you to call on Sir Daniel Bethlehem to continue the submissions of the UAE. Thank you.

The PRESIDENT: I thank Ms ***Al Bastaki***. I now invite Sir Daniel Bethlehem to take the floor. You have the floor.

Sir Daniel BETHLEHEM:

FRAMING THE UAE CASE

I. Opening remarks

1. Mr. President, Members of the Court, Madam Vice-President, good afternoon. It is an honour to appear before you today representing the United Arab Emirates in these proceedings. May I take this opportunity, Mr. President, to wish you and all the Members of the Court, and all the staff of the Registry and, of course, all our friends opposite, well in these challenging times. We would all rather have been in the Great Hall of Justice today, with its symbolism and its atmosphere, and its small rituals, such as the pouring of the water by the Court usher.

2. Mr. President, Members of the Court, my task this afternoon is to address two broad sets of issues. I will, *first*, make some general observations to frame the UAE's preliminary objections and their exclusively preliminary character. I will also address the relationship between these proceedings and the proceedings that are ongoing in Geneva before the CERD Committee and the Conciliation Commission established under Article 12 of the Convention. These observations will be relevant to the submissions to come by Professor Forteau on Article 22 of the CERD. In the *second* part of my submissions, I will turn to our preliminary objection on the scope of the CERD, and in particular that it does not extend to differential treatment between persons on grounds of nationality. This objection will be picked up and developed further by Dr. Sheeran.

3. Mr. President, I anticipate that I will occupy your screens for about 40 minutes or so. I am, of course, in your hands, Mr. President, but if it is convenient to the Court, it would be convenient to ask to take the short break after my submissions conclude.

II. General observations framing the UAE case

A. Preliminary observations

4. Mr. President, with this said, let me turn to the first part of my submissions, and make some general observations on the UAE's case.

5. Having regard to the two provisional measures proceedings in this case, to a contested preliminary phase before the CERD Committee in Geneva, and to the sharply adversarial written pleadings in the present phase of the proceedings before the Court, the picture that emerges is one of irreconcilable divergence. The UAE has reflected on this and it wishes to change that impression. It does not resile from its national security concerns with Qatar. It is not here to accept jurisdiction in this case. It is not here to agree that the measures that it took in June 2017 were improper. But it is here to affirm that it is looking for opportunities to engage with Qatar, with the assistance of third parties if appropriate, to address its concerns and to invite Qatar to respond to them. You have heard Ambassador ***AlNaqbi*** on this in his opening remarks.

6. To this end, with the conclusion of the preliminary phase before the CERD Committee, and the establishment of a Conciliation Commission under Article 12 of the Convention, the UAE, without prejudice to its concerns with that process, wrote to the Conciliation Commission on 27 January 2020 to affirm that it would "engage fully and in good faith in the Conciliation Commission process". You will find this communication at page 78 of your judges' folder[30]. The UAE wrote again to the Conciliation Commission, on 27 April 2020 to "express[] its full confidence in the Commission" and ***confirmed*** that "[t]he UAE looks forward to working with the Commission to fulfil its mandate of making its good offices available to the Parties with a view to an amicable solution to the [present] dispute on the basis of respect for the Convention". You will find this at page 82 of your judges' folder[31]. Qatar, for its part, also wrote to the Conciliation Commission, on 10 February 2020, welcoming the UAE's statement and affirming that it "stands

[30] UAE Note Verbale (27 January 2020), judges' folder, tab 2, p. 78.

[31] UAE Note Verbale (27 April 2020), judges' folder, tab 3, p. 82.

willing and ready to assist the Secretariat and [the] Commission" and that it "looks forward to engaging with the Commission and the UAE to resolve the dispute between the parties". This is at page 85 of your judges' folder[32].

7. To be sure, Mr. President, Members of the Court, the UAE has from the outset engaged with the CERD Committee fully and in good faith, even as it contested the scope of application of the CERD, *ratione materiae*, before the Committee. It appeared before the Committee. It made submissions, fully and with respect to the process. It did not turn its back on the Committee. All of this will be apparent from the documents on the record, including those most recently added to the docket, with the agreement of the Parties, at tabs 5 to 7 of the UAE judges' folder. And it was that engagement with the Committee's procedure that was underlined by the Notes Verbales sent by the UAE to the Conciliation Commission, to which I referred just a moment ago, affirming the UAE's "engage[ment] fully and in good faith with the Conciliation Commission process".

8. And, Mr. President, Members of the Court, as you heard from Ambassador ***AlNaqbi***, the UAE is committed to engaging in the Conciliation Commission process, *regardless of the outcome of this case, including if you find for the UAE on the issue of nationality.* Your judgment will undoubtedly be a matter to be addressed before the Conciliation Commission, and before the Committee, but the UAE is committed to giving the conciliation process a chance. We would like the Commission to be courageous — to use its good offices to see if there is scope to resolve, or at least narrow, the dispute between the Parties with a view to achieving, in the words of Article 12 of the Convention, "an amicable solution of the matter on the basis of respect for [the] Convention".

B. The UAE preliminary objections in the round

9. Mr. President, Members of the Court, against that background, I turn to address the UAE's preliminary objections in the round.

10. We have two principal objections to jurisdiction to make today. Our first objection is that the CERD, with its focus on "racial discrimination", a term that is defined in the Convention, does not address differential treatment on grounds of nationality. "[N]ational or ethnic origin", the phrase that is used in the Convention, does not encompass nationality. And the measures of which

[32] Qatari Note Verbale (10 February 2020), judges' folder, tab 4, p. 85.

Qatar complains were addressed to Qatar and to Qatari nationals. They were not addressed to anyone other than Qatari nationals and did not affect anyone because of their "race, colour, descent, or national or ethnic origin". Persons of Qatari *national origin* but not having Qatari *nationality* were neither addressed nor affected by the measures. Persons having Qatari *nationality* but of some other *national origin* were addressed and affected by the measures. The scope of the measures of which Qatar complains turn entirely on *nationality*, not on national origin. It is our submission that this is a straightforward issue of legal interpretation amenable to determination at this stage of the proceedings.

11. Our second objection is that, given, *first*, the identity of the proceedings before the CERD Committee and Conciliation Commission, on the one hand, and before the Court, on the other, and *second*, that it was Qatar that commenced both sets of proceedings[33], and *third*, that the CERD Committee proceedings were commenced earlier in time and that they are moving forward on the basis of the good faith engagement of both Parties, and, *fourth*, having regard to Article 22 of the CERD, the Court does not have jurisdiction to hear Qatar's claim. Professor Forteau will develop this objection further. I will not trespass into his submissions but for the brief observation that we do not consider that this case ultimately turns on whether the procedures mentioned in Article 22 are alternative or cumulative. There is that argument, and both Parties have engaged with it in their written submissions. For our part, though, we think there is a more straightforward way to look at this issue. This issue is not so much one of alternative versus cumulative, as an abstract question of interpretation. It is that, in the reality of this case, Qatar commenced proceedings before the CERD Committee *before* it turned to the Court. The dispute in issue in the two sets of proceedings is substantially the same. The Conciliation Commission process is underway**, *both*** Parties having indicated that they will engage with that process in good faith. The "which is not settled by" language in Article 22 does not include a sunset clause. Good faith requires that Qatar, having started the process, must let it work its course.

12. Mr. President, Members of the Court, there are a number of other jurisdictional objections that I need to address, but can do so briefly.

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[33] Qatar's CERD Committee Communication, 8 Mar. 2018, POUAE, Ann. 12; AQ.

13. First, at paragraph 58 of its Application, Qatar alleges a breach of various articles of the CERD as well as "the customary international law principle of non-discrimination"[34]. On this basis, Qatar prays in aid of its case the text of and decisions under a host of regional and international human rights instruments, including instruments to which the UAE is not a party. The CERD, however, Mr. President, Members of the Court, is a very particular instrument, carefully crafted and circumscribed by a definition of "racial discrimination" which intentionally, by design, excludes "nationality". Qatar, however, is attempting to prise open the scope of the Convention, beyond its text and beyond the intention of its drafters, and purporting to resort to customary international law to do so. There can be no doubt, however, that the scope of your jurisdiction under the CERD compromissory clause, concerning disputes relating to the interpretation or application of the Convention, does *not* extend to questions of customary international law, whether for purposes of interpretation or application.

14. Second, if I may, I would like to direct the Court's attention to paragraphs 136 and 137 of our written objections in which we observe that, in so far as Qatar complains of measures that address Qatari corporations, rather than individuals, they fall outside the scope of the CERD.

15. Third, I note that, in Chapter V of the UAE's Preliminary Objections, it advanced an objection to admissibility on the grounds that Qatar's claim is abusive and must, for this reason, be deemed inadmissible. Having reflected on this further, the UAE does *not* pursue any allegation of abuse as a separate ground at this stage of the proceedings.

16. Fourth, in the first provisional measures phase, the UAE signalled a likely objection on the ground of non-exhaustion of local remedies. In its written observations, Qatar suggested that the UAE had abandoned its non-exhaustion claim. I note in response only that a decision not to advance an objection to jurisdiction or admissibility as one that requires decision at a preliminary stage cannot be taken as an abandonment of such objection.

17. Mr. President, Members of the Court, this said, the two core preliminary objections that we will address further in these proceedings are, *first*, that the Convention does not encompass differential treatment on grounds of nationality, that national origin cannot be equated to

[34] AQ, para. 58.

nationality, and that, as the UAE measures are addressed to Qatar and Qatari nationals, they fall outside of the scope *ratione materiae* of the Convention, and, *second*, that the terms of Article 22, *in the particular circumstances of this case*, preclude the Court's jurisdiction.

18. Against this background, let me address the exclusively preliminary character of these objections.

19. Mr. President, Members of the Court, the Article 22 objection is simply a question of law: does the phrase "which is not settled by" in Article 22 of the Convention operate to preclude the Court's jurisdiction in the particular circumstances of this case? The Court has all the information it needs to address this issue.

20. Similarly, the nationality issue is also a straightforward question of law: does the scope of the Convention extend to differential treatment on grounds of nationality? Can nationality be equated to national or ethnic origin? This issue is also readily amenable to preliminary determination, the Court having before it all the necessary submissions of the Parties on the subject.

21. There are, however, two potentially further elements to the nationality enquiry that we anticipate Qatar will put before you on Wednesday for purposes of contending that they require joinder to the merits. The first is the question of whether contested measures that are framed in terms of nationality may nonetheless have an effect on protected groups under the CERD. The second is the proposition that whether the measures in issue in these proceedings have an effect on CERD protected groups can only be assessed in the course of a merits proceedings. Our preliminary and pre-emptive response on these issues is as follows.

22. The headline question of whether a "distinction, exclusion, restriction or preference" of Qatari nationals, qua nationals, comes within the scope of the CERD cannot be avoided. This is a straightforward question of legal interpretation. An effects analysis that endeavours to recast Qatari nationality as a subset of "race" or "descent" or "national or ethnic origin" is simply a device by Qatar. The case brought by Qatar is in respect of measures that are addressed to Qatari nationals, not measures that are directed at some conception of the Qatari race, or persons of Qatari descent, or persons of Qatari national or ethnic origin. While Qatar has pressed the buttons of the language of the CERD definition of "racial discrimination", the case that it has brought is not an indirect

effects case. *That would be a different case that would have to be differently pleaded by Qatar, and materially so.*

23. I note in this regard the observation in the joint declaration of Judges Tomka, Gaja and Gevorgian to the Court's first Provisional Measures Order in this case that "[d]ifferences of treatment of persons of a specific nationality may target persons who also have a certain ethnic origin and therefore would come [within] the purview of CERD, *but this possibility has not been suggested by Qatar*"[35]. This appreciation, which we respectfully adopt, was made on the basis of both Qatar's Application instituting proceedings and its request for provisional measures. And it is at that point, at the point of the seisin of the Court, that jurisdiction falls to be assessed.

24. There is a further observation that is required. Qatar's case before the Court is encapsulated by its Application instituting proceedings, its contemporaneous provisional measures Request, its Memorial, and its Observations on the UAE Preliminary Objections. Given the identity of the two cases, the subject-matter of Qatar's case before the Court can also properly be gleaned from its Communication to the CERD Committee. The true subject-matter of Qatar's case also emerges from the annexed material submitted to the Court along with Qatar's pleadings.

25. For purposes of these preliminary objections, the UAE invites the Court to take the Qatari pleadings as it finds them. The UAE, of course, contests Qatar's allegations, both of fact and of law, but, for purposes of determining at this preliminary stage whether Qatar's pleaded case comes within the scope of the CERD, it is appropriate and indeed it is necessary for the Court to have regard to the totality of what Qatar has put to the Court at this point. This is not trespassing into the merits of the dispute. On the contrary, the Court's jurisprudence is clear that for purposes of determining the subject-matter of an applicant's case, as a basis, thereafter, for assessing whether it comes within the scope of the relevant compromissory clause, the Court must identify the real issue in dispute by reference to the totality of what the applicant has put to the Court. This is not to trespass into the merits. It is simply what is required to properly assess jurisdiction.

26. Mr. President, Members of the Court, Qatar's pleaded case is that the UAE measures in issue come within the scope of the CERD because Qatari nationality is encapsulated by Qatari

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[35] *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),* joint declaration of Judges Tomka, Gaja and Gevorgian, p. 437, para. 6, emphasis added.

national origin. It is this jurisdictional overreach by Qatar that requires determination by the Court at this preliminary stage. There is nothing here that warrants joinder to the merits. The Court has before it everything that is required for a preliminary decision on this issue.

C. The CERD Committee and Conciliation Commission process

27. Mr. President, Members of the Court, I would like to return briefly to the CERD Committee and Conciliation Commission proceedings. At the provisional measures stage, in response to the UAE's argument[36], Qatar's position was that the proceedings in Geneva were distinct from the proceedings before the Court. Its case turned on four propositions. First, Qatar said, the CERD Committee is not a judicial tribunal. Second, it said that the principle of *lis pendens* could not apply because the disputes before the Committee and the Court were not identical. Third, Qatar said that there is no rule of international law that precludes a complainant from using one procedure only. Finally, Qatar said that the CERD does not stipulate an exclusively incremental procedure.

28. Mr. President, Members of the Court, with these submissions, *Qatar stands on formalism at the expense of truth.* Professor Forteau will address the Article 22 dimension of this aspect. Let me say at this stage, however, that this is a case in which Qatar turned to and invoked the Geneva institutions, not once, not twice, but three times. This is a case in which a Qatari-invoked Conciliation Commission is now constituted and seised of the dispute. And it is a conciliation commission of illustrious composition, including a former Vice-President of this Court and four other notable experts and authorities with wide experience of both human rights and inter-State dispute settlement. And this is also a case in which both Parties have formally committed themselves to good faith engagement with the conciliation process.

29. On the issue of the identity of the dispute brought in the two proceedings, there are elements of ***differences*** in formulation, but these are inconsequential. The measures of which Qatar complains are the same. In every material sense, the dispute of which the Committee and Conciliation Commission is seised is exactly the same dispute with which Qatar would like to seise the Court — in origin, in content, in coverage.

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[36] CR 2019/5, pp. 28-29, paras. 3-6, and p. 32, para. 16 (Reisman); also CR 2019/7, p. 19, paras. 7-9 (Reisman).

30. Mr. President, Members of the Court, Article 22 addresses precisely the circumstances with which we are now faced. It does not prefer the Committee procedures over those of the Court, or those of the Court over those of the Committee. But when an applicant goes to the Committee, when a conciliation commission is established, when both Parties indicate a commitment to engage with the conciliation process in good faith, those procedures must be permitted to run their course.

31. Mr. President, Members of the Court, I only add that, whatever may have been the case in the provisional measures phase, the UAE is *not* here advancing a *lis pendens* argument or an *electa una via* argument. Those principles avail us, but we do not need them. We rely on the terms, properly construed, of Article 22 of the Convention. That is more than sufficient to carry the point.

III. The CERD does not address distinction on grounds of nationality

32. Mr. President, Members of the Court, I come to the second part of my submissions, addressing the scope *ratione materiae* of the CERD; and in particular, that it does not extend to measures of distinction, exclusion, restriction or preference based on nationality and that the term "national or ethnic origin" does not encapsulate nationality.

33. As a preliminary matter, let me say that, on this issue, we stand fully on our written objections. For ease of reference, I footnote here those parts of our written objections to which we commend your particular attention on this issue[37].

34. Mr. President, Members of the Court, the scope *ratione materiae* of the CERD is addressed in Article 1. For the convenience of all the Members of the Court, you will find the various language versions of the CERD at tab 1 to your judges' folder. That is English, French, Arabic, Chinese, Russian and Spanish.

35. The language of Article 1 (1) is plain. I am reading now from the English text, which is at page 15 of your judges' folder, but all the various language versions follow thereafter[38]. The term "racial discrimination", which defines the scope of the Convention, is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or

[37] POUAE, Chap. III, in particular at paras. 70-134.

[38] French, p. 25; Arabic, p. 34; Chinese, p. 42; Russian, p. 54; Spanish, p. 66.

exercise" of rights. *This definition does not, in terms, encompass nationality.* And it is clear that this is not mere oversight. Express reference is made to "nationality" in Article 1 (3) and Article 5 *(d)* (iii) of the Convention. The term "citizens" (which for these purposes is synonymous with "national") is used in Article 1 (2). These references indicate clearly that the drafters of the Convention had the concept of nationality closely in mind when drafting the Convention, but chose not to use it when defining the concept of "racial discrimination".

36. The enumerated definition, moreover, is highly material, not only for what it omits — any reference to nationality — but also for the evident underlying rationale of the elements that it does include, namely, "hereditary physical traits"[39]. A person cannot escape his or her race. They cannot escape their colour. They cannot escape their descent. They cannot escape their national or ethnic origin. They may try to hide these traits, but they cannot escape them. They were born with them and they are a matter of fact. They carry these traits with them throughout their lives. They cannot be divested. They are intrinsic to the individual. It is these intrinsic, hereditary characteristics of all human beings that the CERD had the purpose of addressing.

37. Not so with nationality. As the Court observed in its *Nottebohm* merits Judgment, nationality is a matter for sovereign determination by each State. It serves, in the words of the Court, "to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals"[40]. Nationality, in other words, flows from an express politico-legal act by a State. It is not a hereditary, physical trait of an individual. It is, to quote the Court again, "a legal bond" which denotes "the existence of reciprocal rights and duties" with the State conferring nationality[41].

38. This distinction between nationality, on the one hand, and "national or ethnic origin", on the other, was and is well understood. Drawing expressly on *Nottebohm*, for example, the drafters of the European Convention on Nationality of 1997 defined "nationality" as meaning "the *legal bond* between a person and a State *and does not indicate the person's ethnic origin*"[42]. You will

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[39] *The Prosecutor* v. *Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, Judgment of 2 Sept. 1998, para. 514.

[40] *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, p. 20.

[41] *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, p. 23.

[42] European Convention on Nationality, Council of Europe, 6 Nov. 1997, European Treaty Series No. 166, Article 2 *(a)*, emphasis added.

find this Convention, and its Explanatory Report, at ***tabs 9 and 10*** of your judges' folder. The Explanatory Report of the Convention, explicitly referencing *Nottebohm*, says of the definition that it "refers to a *specific legal relationship* between an individual and a State which is recognised by that State"[43].

39. Mr. President, Members of the Court, the reason that nationality was excluded as a prohibited ground of discrimination under the CERD was that States considered, and still consider, that there were and remain lawful and permissible reasons for differential treatment between persons on grounds of nationality or citizenship[44].

40. If the CERD were to include within its scope differential treatment on grounds of nationality, every selective visa waiver programme and common or preferential travel area around the world would fall foul of the CERD. Such an interpretation would cause havoc with settled immigration laws. Regulations, measures or acts that require particular conduct of certain foreign nationals (such as the registration of foreign agents), or provide for the selective preference of home nationals (such as employment in sensitive government positions), would also be contrary to the CERD. Many other types of measures routinely enacted would also be caught. Were this to be the case, there would be a risk of wholesale denunciations of the Convention or requests for its revision.

41. CERD parties, moreover, as a matter of their subsequent practice, frequently differentiate between nationalities, not just between their own nationals and foreign nationals, but also as between foreign nationals. There is a wide array of other examples of differential treatment on

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[43] Explanatory Report to the European Convention on Nationality, Council of Europe, 6 Nov. 1997, European Treaty Series No. 166, para. 23, emphasis added.

[44] See Draft International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Third Committee; Official Records of the United Nations General Assembly (UNGA), Twentieth Session, doc. A/6181, 18 Dec. 1965, pp. 11-14, paras. 28-41 (POUAE, Vol. III, Ann. 39); Amendment proposed by the US and France: doc. A/C.3/L.1212; reproduced in Draft International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Third Committee; Official Records of the UNGA, Twentieth Session, doc. A/6181, 18 Dec. 1965, p. 12, para. 32 (POUAE, Vol. III, Ann. 39); Official Records of the UNGA, Twentieth Session, Third Committee, 1304th meeting, doc. A/C.3/SR.1304, 14 Oct. 1965 (POUAE, Vol. III, Ann. 40); Amendment proposed by Ghana, India, Kuwait, Lebanon, Mauritius, Morocco, Nigeria, Poland and Senegal (doc. A/C.3/L.1238); reproduced in Draft International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Third Committee; Official Records of the UNGA, Twentieth Session, doc. A/6181, 18 Dec. 1965, pp. 13-14, para. 37 (POUAE, Vol. III, Ann. 39); Official Records of the UNGA, Twentieth Session, Third Committee, 1307th meeting, doc. A/C.3/SR.1307, 18 Oct. 1965, paras. 1-30 (POUAE, Vol. III, Ann. 41); CR 2018/13, 28 June 2018, pp. 46-48, paras. 51-59 (Olleson); POUAE, paras. 112-115.

grounds of nationality, a selection of which are provided in our written observations, all the stuff of everyday policy and practice by CERD contracting parties[45].

42. Mr. President, Members of the Court, our written objections underpin the observations I am making today by way of a systematic interpretation of the Article 1 (1) definition of racial discrimination. It is our submission that the exclusion, or the non-inclusion, of differential treatment on grounds of nationality from the scope of the CERD is borne out by *every step of the interpretative analysis* that is mandated by the principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In the interests of time, I do not endeavour to summarize these submissions but I simply adopt them and make one further observation.

43. Qatar relies heavily on paragraph 4 of General Recommendation XXX of the CERD Committee to suggest that the Committee has adopted a wide interpretation of the scope of the Convention. In doing so, however, Qatar relies on an incomplete reading of that paragraph 4. It notably fails to give weight to the qualifying language in the paragraph that requires that the application of the Convention in cases of differential treatment based on citizenship is to be "judged in the light of the objectives and [the] purposes of the Convention". In other words, in the light of the proper scope *ratione materiae* of the Convention.

44. I note also that the Committee's views on this subject have waxed and waned over the years. General Recommendation XI (1993) expressed a different view on the issue. While General Recommendation XXX states that it replaces General Recommendation XI, the interpretation and application of treaties is subject to clear principles, including as regards the subsequent practice of States parties to the treaty in question. And, as regards General Recommendation XXX, there was no consultation process with States on the basis of a draft text circulated by the Committee prior to its adoption. A reading of General Recommendation XXX in the terms proposed by Qatar does not therefore comport with an interpretation of the Convention by reference to settled principles of treaty interpretation.

[45] POUAE, Chap. III, Sect. 7, paras. 116-129.

45. ***And*** I note further that General Recommendations are just that, recommendations. They do not constitute dispositive interpretations of the Convention. This point is underlined by the International Law Commission (ILC) in its draft conclusions on subsequent practice[46].

IV. Closing remarks

46. Mr. President, Members of the Court, I come to my closing remarks. My submissions are intended to set the scene for the submissions to come from Dr. Sheeran and Professor Forteau. If there is one thing we would like you, and our friends opposite, to take away from my remarks today it is that the UAE is looking for ways to change the landscape. It would like to believe that good offices by the CERD Conciliation Commission, engaging with the whole of the dispute, has potential to resolve, or at the very least to narrow, the dispute. The UAE has signalled its commitment to that procedure. We expect Qatar to engage fully and constructively on these issues.

47. Mr. President, Members of the Court, that concludes my submissions. I thank you for your attention in these unusual circumstances. Mr. President, if it is convenient for the Court, this may be a good time for a break. If so, after the break, Mr. President, may I ask you to call on Dr. Sheeran to continue the UAE's submissions.

The PRESIDENT: I thank Sir Daniel Bethlehem for his presentation. The Court will indeed observe a coffee break of 10 minutes and I will call on the next speaker after the break. In the meantime, I would like to ask all those who have joined us by video link not to go away and not to disconnect from the system. You can have your coffees and breaks on-site, and we will be back in 10 minutes to resume the proceeding.

The Court is adjourned from 4.25 p.m. to 4.40 p.m.

The PRESIDENT: The sitting is resumed. I will now give the floor to Mr. Scott Sheeran. You have the floor.

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[46] International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* (adopted at second reading) (2018), doc. A/73/10, Commentary to Conclusion 13, p. 110, paras. (9) and (10).

Mr. SHEERAN:

THE ABSENCE OF JURISDICTION *RATIONE MATERIAE*

I. Introduction

1. Mr. President, Members of the Court, it is a privilege to appear before you, representing the United Arab Emirates. My task — picking up where Sir Daniel left off — is to further address the UAE's jurisdictional objection based on the scope *ratione materiae* of the Convention.

2. As already stated by Sir Daniel, at its heart, this case concerns the UAE's differential treatment of Qatar and Qatari nationals. My main purpose today is to demonstrate that the case presented by Qatar — assuming, for present purposes, its truth — simply does not sustain a conclusion that the UAE's measures fall within the jurisdiction *ratione materiae* of the CERD.

3. It is common ground between Qatar and UAE that the measures complained of are not "based on" race, colour, descent or ethnic origin. Nor could they be, in light of the shared ethnicity, language, culture, and history of the people of these two neighbouring and young Gulf Arab States, as Ms ***Al Bastaki*** has explained.

4. The decisive question for the Court, therefore, is whether the UAE's measures fall within the definition of racial discrimination and, in particular, whether they are "based on" the ground of "national . . . origin" as proscribed in Article 1, paragraph 1 of the CERD. If not, Qatar's case does not come within the scope of application of the Convention.

5. The UAE's case is straightforward. Namely, the material before the Court concerning the UAE's measures clearly demonstrates that they are "based on" nationality. As nationality is not one of the prohibited grounds of discrimination under Article 1 (1), the dispute does not fall within the provisions of the Convention. Moreover, there is nothing before the Court to support a conclusion that the UAE's measures are "based on" national origin.

6. The Court should not accept Qatar's *ex post facto* attempt to relabel the UAE's measures as targeted at "national origin". As Ms ***Al Bastaki*** stated, each UAE measure or action is expressly based on "nationality" or directly implicates Qatari nationals *only*. Individuals of non-Qatari nationality are *not* subject to the UAE's measures, even *if* they are of Qatari national origin.

7. My speech today consists of three parts. First, I will speak to the key guiding principles for the Court's determination of the scope of the Convention *ratione materiae* and the Court's

jurisdiction over this dispute. Second, I will demonstrate that Qatar has re-engineered its arguments to attempt, ultimately unconvincingly, to shoehorn this dispute into the racial discrimination framework. Third, I will show the absence of anything on the record from Qatar to demonstrate that the UAE's measures directly implicate a protected group under the Convention.

II. The applicable principles for determining jurisdiction *ratione materiae*

8. Mr. President, Members of the Court, I will now turn to key guiding principles which assist the Court's determination of its jurisdiction in this dispute. There are three main points that I wish to make.

9. First, consent is the touchstone of the jurisdiction of this Court. As the Court stated in *Ukraine* v. *Russia*, "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them"[47]. This basic axiom is worth recalling in light of the unusual characteristics of this case. As the UAE has demonstrated, the distinction between "nationality" and "national origin" is widespread and common in State practice[48]. This distinction is applied meaningfully to many human rights, including the rights to enter and reside, entitlement to social security, costs of educational fees, to name a few.

10. Qatar's assertion that Qatari nationality and Qatari national origin are synonymous, due to a high coincidence between the two groups' memberships, is not unique to Qatar's demographics. This natural overlap is applicable to the majority of States parties to the Convention, whether it is Poland, Kenya, Thailand, Barbados — and most States parties that are not heavily comprised of immigrant populations. Accordingly, Qatar's strained interpretation risks transforming the Convention into a wide-reaching instrument, under which a State is obliged to treat all foreigners in the same manner as its own nationals. That is not interpreting, but rather revising, the Convention.

11. Second, there is a general and well-established test for determining jurisdiction *ratione materiae* under a compromissory clause granting jurisdiction over disputes relating to the

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[47] *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*), *Preliminary Objections, Judgment of 8 November 2019*, para. 33.

[48] Written Statement of the State of Qatar concerning the Preliminary Objections of the UAE (WSQ), paras. 116-129.

interpretation and application of a treaty. This test was set out in *Oil Platforms* and has been confirmed in subsequent cases, most recently, *Ukraine* v. *Russia*[49]. You will find a copy of the relevant text from *Ukraine* v. *Russia* at tab 11 of the judges' folders. The Court stated that "it is necessary to ascertain whether the acts of which the applicant complains 'fall within the provisions' of the treaty"[50], and further, the Court recognized that, even at the jurisdictional stage, "[t]his may require the interpretation of the provisions that *define the scope of the treaty*"[51]. As already noted, the *scope of the Convention* is central to the preliminary objections in this case.

12. Third, given the very different circumstances of *Ukraine* v. *Russia*, the approach taken by the Court in that case concerning jurisdiction *ratione materiae* under the CERD does not apply to the circumstances of this case.

13. Crucially, as recognized in *Ukraine* v. *Russia*, there was agreement between the parties "that Crimean Tatars and ethnic Ukrainians in Crimea constitute *ethnic groups* protected under CERD"[52]. By contrast, in the case before you, any similar agreement amongst the Parties that Qatari nationals constitute a group protected under the CERD is completely lacking. The Parties do agree, however, to use Qatar's words, on the "relative proximity [and] shared culture" of their people, and the fact that Emirati and Qatari "[f]amily ties often cut across national boundaries" and "span generations".

14. A further distinction is that Russia, as part of its objection *ratione materiae*, had contested whether certain rights invoked by Ukraine were protected under the CERD. The arguments of Russia included the scope of the *substantive* rights of the Convention and, in

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[49] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 809-810, para. 16; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, I.C.J. Reports 2018*, p. 308, para. 46; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, I.C.J. Reports 2019*, p. 23, para. 36; *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*), *Preliminary Objections, Judgment of 8 November 2019*, para. 57.

[50] *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*), *Preliminary Objections, Judgment of 8 November 2019*, para. 57.

[51] *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*), *Preliminary Objections, Judgment of 8 November 2019*, para. 57, emphasis added.

[52] *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*), *Preliminary Objections, Judgment of 8 November 2019*, para. 95, emphasis added; see also *ibid*., para. 80.

particular, under Article 5[53]. Again, and in stark contrast, UAE's objection *ratione materiae* does not involve contesting the scope of rights protected under the CERD. Rather, it turns on the correct interpretation of the notion of "national origin" under Article 1 (1); the key provision for defining the scope *ratione materiae* of racial discrimination. It is, by nature, a jurisdictional issue. It is also an issue which the Court can, and we submit, should, resolve as a preliminary matter.

III. The basis of Qatar's claim is "nationality" and not "national origin"

15. Mr. President, Members of the Court, as Sir Daniel noted, whether differential treatment of Qatari nationals, qua nationals, comes within the scope of the CERD is the headline question and cannot be avoided[54].

16. As I will demonstrate, it is clear that Qatar's argument that the UAE's measures amount to "racial discrimination" based on "national origin" is an *ex post facto* rationalization. It is a consequence of Qatar's attempt to shoehorn this dispute into the scope of the CERD. As the proceedings before the Court have progressed, it has become evident that Qatar fully understands it is claiming that the UAE's measures are based on nationality. In this respect, Qatar has simply reverted back to its consistent position prior to institution of the proceedings before the Court.

17. In *Bolivia* v. *Chile*, the Court indicated ***that*** to identify the subject-matter of the dispute it "examines the positions of both parties, 'while giving particular attention to the formulation of the dispute chosen by the [a]pplicant'"[55]. In addition, the Court stated that "[i]n particular, it takes account of the facts that the applicant identifies as the basis for its claim"[56].

18. A close reading of the Qatari Application demonstrates that Qatar uses both "nationality" and "national origin" interchangeably[57]. The title of the key section of the Application addressing "[t]he Facts" is unambiguous; it is entitled: "Imposition of Discriminatory Measures against Qatar and *Qatari Nationals*"[58]. Moreover, instead of stating the term "Qatari nationals", the Application

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[53] *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), Preliminary Objections, Judgment of 8 November 2019*, paras. 82-84.

[54] See Bethlehem, above, p. 31, para. 22.

[55] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (I)*, p. 592, p. 602, para. 26.

[56] *Ibid.*

[57] AQ, paras. 3, 34, 44, 54, 58, 59, 60, 63 and 65.

[58] AQ, p. 20, emphasis added.

refers throughout only to "Qataris"[59]. This deliberate device will not fool anyone. The vast majority of the over one hundred references to "Qataris" throughout the Application can only be read in context as meaning "Qatari nationals". For example, Qatar in its Application states that "the measures target Qataris and [they] do not apply to *other non-citizens* of the UAE"[60]. This reference to Qataris can only mean Qatari nationals.

19. When appearing before the Court in the first provisional measures and identifying the basis of its claim, Qatar could not have been clearer in stating that the UAE's measures are based on nationality. As the Agent of Qatar indicated, "the UAE has enacted a series of broad, discriminatory measures against my country and its people *on the basis of their Qatari nationality*"[61]. Counsel for Qatar also stated "the UAE and other States enacted a series of discriminatory measures targeting Qataris *on the basis of their nationality*"[62].

20. The framing of Qatar's claim in the first provisional measures proceedings, as based on nationality, was not a simple slip of the tongue. Rather, Qatar reverted to what it had been saying all along, and in common with the UAE's position; namely, that the UAE's measures are based *solely on nationality*.

21. In March 2018, for example, Qatar stated in its Communication that instituted proceedings before the CERD Committee that the "UAE unlawfully targeted Qatari citizens *solely on the basis of their nationality*"[63]. Further, in April 2018, the Qatari Minister of State for Foreign Affairs wrote in a letter to the UAE calling for negotiations that the UAE had "enacted and implemented discriminatory statutes and policies directed at Qatari citizens and companies *on the sole basis of their nationality*"; and further, he added, that the UAE's actions "unlawfully and without precedent target Qatari nationals and not others *on the basis of their nationality*"[64].

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[59] AQ, paras. 1-3, 9, 65, 66.

[60] AQ, para. 56.

[61] CR 2018/12, p. 15, para. 2 (Al-Khulaifi); emphasis added.

[62] CR 2018/12, p. 22, para. 16 (Donovan); emphasis added.

[63] See POUAE, Vol. II, Ann. 12: Committee on the Elimination of Racial Discrimination, *State of Qatar* v. *United Arab Emirates*, Communication submitted by Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination, 8 Mar. 2018, para. 58, emphasis added.

[64] AQ, Ann. 21: Letter from H.E. Sultan Bin Saad Al-Marikhi, Qatar Minister of State for Foreign Affairs of the State of Qatar to H.E. Mr. Anwar Mohammed Gargash, UAE Minister of State for Foreign Affairs, 25 Apr. 2018, pp. 3-4, emphasis added.

22. In addition, Qatar in its Written Statement on the Preliminary Objections has also developed a further argument, that the evidence reveals the UAE's measures *intentionally* targeted persons of Qatari "national origin" rather than of Qatari nationality[65].

23. The Court's task of course is to determine, objectively, the subject-matter of this dispute, and the Court's jurisdiction *ratione materiae* under the CERD. While Qatar has framed its case in terms of the UAE's measures are based on and target those of Qatari "national origin", it has also claimed that the UAE's measures are based on and target those of Qatari "nationality". This crucial discrepancy in Qatar's identification of its claim is not a mere result of the natural development and building of its case, prior ~~***to***~~ and subsequent to the Application. Rather, it reveals that Qatar fully understands and accepts that the UAE's measures are based on and target "nationality", and also that Qatar realizes it cannot admit this obvious fact due to the devastating consequences for its claim falling within the scope of the CERD.

IV. The UAE's measures were addressed to Qatar and Qatari nationals, and not a protected group within the scope of the CERD

24. Mr. President, in this regard, I now wish to turn to each of Qatar's four claims, to show that none of them, even if accepted as a matter of fact, falls within the scope of the Convention. These are: first, the immigration controls in respect of Qatari nationals; second, the advice to Qatari nationals to leave the UAE; third, the blocking of websites of certain Qatari media-related corporations; and fourth, the UAE's alleged responsibility for incitement to discrimination.

A. Immigration controls

25. Mr. President, I will turn now to Qatar's first claim against the UAE concerning the immigration controls. Qatar claims that the UAE is responsible for an "Absolute Travel Ban"[66] and later on a "Modified Travel Ban"[67]. In particular, Qatar contends that "the 5 June Directive . . . established an unconditional ban on travel and entry of 'Qatari *nationals*' in the UAE"[68].

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[65] WSQ, paras. 1.127, 2.128, 2.130.

[66] MQ, para. 2.26.

[67] MQ, para. 2.32.

[68] MQ, paras. 2.26, 2.12; WSQ, para. 75.

26. As noted by Ms ***Al Bastaki***, however, many Qatari nationals have travelled to and from the UAE following the 5 June 2017 Declaration, by simply seeking prior permission to enter[69]. The material before the Court indicates that, at *all* stages of this dispute, the UAE immigration controls in question have applied expressly to and directly implicated Qatari nationals, not those of Qatari national origin[70].

27. In this regard, Qatar and the UAE have both put on record the official statements of the UAE Government. In particular, these include the Declaration of 5 June 2017[71], the Ministry of Interior circular of 5 June 2017[72], the Emirates News Agency statement of 7 June 2017[73], and the Ministry of Foreign Affairs and International Cooperation statement of 5 July 2018. All of these documents are express and consistent on one key fact; that the immigration controls apply to Qatari nationals. I have provided you the text of the Declaration of 5 June 2017 at tab 12 of the judges' folders.

28. In addition, Qatari official statements from the time demonstrate that Qatar also understood that the immigration controls applied to Qatari nationals. The Qatari Embassy in the UAE provided public guidance on 5 June 2017 that the measures applied to "[c]itizens of Qatar"[74]. You will find the relevant text at tab 13 of the judges' folders.

29. Most importantly, there is nothing in the record from Qatar to show that the UAE's immigration controls were applied to individuals of Qatari national origin, but whom are *not* Qatari nationals. For example, Qatar does not suggest that the immigration controls applied to individuals who are a descendant of a Qatari mother but with a non-Qatari father. This group of individuals are

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[69] See Exh. 14 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 request for the indication of provisional measures.

[70] See POUAE, Vol. III, Ann. 57: UAE Ministry of Foreign Affairs and International Cooperation Announcement, Directive for Hotline Addressing Mixed Families, 11 June 2017; Exh. 3 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 request for the indication of provisional measures (Part 1: Report of Abu Dhabi Police on Hotline, Real Estate, Funds, Licenses and Immigration, 20 June 2018), p. 2; POUAE, Vol. III, Ann. 58: UAE MoFAIC, Immigration Statement (5 July 2018). See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 476-477, dissenting opinion of Judge Crawford, paras. 6-7.

[71] POUAE, Vol. III, Ann. 56: Declaration of the United Arab Emirates, 5 June 2017.

[72] See MQ, para. 2.27 and Vol. II, Ann. 2: United Arab Emirates Ministry of Interior, General Directorate of Residency & Foreigners Affairs — Dubai, *Ban on Travelers from and to Qatar* (5 June 2017) (with certified translation).

[73] MQ, para. 2.31.

[74] MQ, Vol. II, Ann. 52; Twitter posts regarding the 5 June 2017 measures, *@qatarembassyUAE* (5 June 2017).

not *ab initio* Qatari nationals, and commonly only hold the nationality of their father, a non-Qatari[75]. Qatar also does not suggest that Qatari women who have lost their nationality by operation of Qatari law, due to taking their husband's nationality, are subject to the UAE's immigration controls[76].

30. Conversely, Qatar has not suggested that those who hold Qatari nationality by virtue of naturalization, and who are not of Qatari national origin, are exempt from the UAE's immigration controls. Take, for example, Nayef Salam Muhammad Ujaym Al-Hababi, who is a United Nations Security Council designated terrorist. He was born in Saudi Arabia as a national of that State[77], but appears to have been awarded a Qatari passport and citizenship, which is legally done by decree of the Qatari Emir[78]. Given his Qatari nationality, this type of individual would need to seek permission and a visa to travel to the UAE.

31. In sum, all of the material before the Court, including that submitted by Qatar, is clear that the UAE's immigration controls are based on nationality, and accordingly, that they fall outside the scope of the Convention. There is nothing to support Qatar's *ex post facto* rationalization that the UAE's immigration controls in fact are targeted at those of Qatari national origin. That is not Qatar's pleaded case.

B. Statement that Qatari nationals to leave the UAE

32. Mr. President, Members of the Court, I will turn now to Qatar's second claim against the UAE. This concerns the UAE's statement to Qatari nationals on 5 June 2017, for precautionary security reasons, to leave the UAE within 14 days. In this regard, Qatar's allegations against the UAE are framed as "the collective expulsion of Qataris from the UAE pursuant to its 5 June Directive"[79].

33. As Ms ***Al Bastaki*** explained, the UAE flatly rejects the Qatari claim of collective expulsion. There was no implementation or enforcement by the UAE authorities against Qatari

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[75] MQ, para. 3.101.

[76] Law No. 38 of 2005 on the acquisition of Qatari nationality 38/2005, Art. 10, in MQ, Ann. 69.

[77] See United Nations Security Council, ISIL (Da'esh) and Al-Qaida Sanctions Committee, *The List established and maintained pursuant to Security Council res. 1267/1989/2253*, listing No. QDi.390, available at https://scsanctions.un.org/en/?keywords=al-qaida.

[78] MQ, Vol. II, Ann. 69: Law No. 38 of 2005 on the acquisition of Qatari nationality 38/2005, Art. 2.

[79] WSQ, para. 2.6.

nationals of the general statement in the 5 June Declaration. Qatari nationals remained in the UAE, both at the time, and to this day, and as participants in Emirati society. However, that is not the Court's present inquiry. Rather, the question today is whether Qatar's ***claim***, even if accepted, ***falls*** within Article 1 (1) of the CERD, and in particular whether the individuals concerned are indeed a protected group under the Convention.

34. Similarly, all the relevant UAE Government statements submitted by Qatar for the record are express and consistent; the UAE's advice directly implicated Qatari nationals who are resident or visiting the UAE. In addition to the UAE official statements to which I have already referred, in particular the Declaration of 5 June 2017, the UAE Ministry of Foreign Affairs and International Cooperation issued a clarifying statement on 5 July 2018. This also was clearly directed to "Qatari citizens"[80]. That clarifying statement can be found at tab 14 of the judges' folders.

35. The Declaration of 5 June 2017, including given its express reference to "Qatari nationals", makes clear that "Qatari residents and visitors in the UAE" should be understood to refer to Qatari nationals, and not to persons of Qatari national origin. There is nothing in the record available to the Court for the purposes of this preliminary objections proceeding to indicate otherwise. In fact, as the Qatari Embassy stated in its public guidance at the time: "*Citizens of Qatar* must leave the United Arab Emirates within 14 days in accordance with the statement issued by the competent Emirati authorities"[81]. Almost a year later, the Qatari Minister of State for Foreign Affairs reiterated this same understanding; the Minister referred in his letter to the UAE requesting negotiations to "expelling all Qatari *nationals* within the borders of the State of the United Arab Emirates"[82].

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[80] POUAE, Vol. III, Ann. 58: Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation, 5 July 2018.

[81] MQ, Vol. II, Ann. 52: Twitter posts regarding the 5 June 2017 measures, *@qatarembassyUAE* (5 June 2017); POUAE, Vol. III, Ann. 87: "Qatar asks citizens to leave UAE within 14 days — embassy", Reuters, 5 June 2017, available at: https://www.reuters.com/article/us-gulf-qatar-citizens-emirates/qatar-asks-citizens-to-leave- uae-within-14-days-embassy-idUSKBN18W1FT.

[82] AQ, Ann. 21: Letter from H.E. Sultan Bin Saad Al-Marikhi, Minister of State for Foreign Affairs of the State of Qatar, to H.E. Mr. Anwar Mohammed Gargash, UAE Minister of State for Foreign Affairs, 25 Apr. 2018, p. 4, emphasis added.

36. As a result, it is again clear that, even if Qatar's alleged facts were to be accepted as true, it would only indicate that the UAE's immigration or residency controls are based on Qatari nationality, and therefore, that they fall outside the scope of Article 1 of the Convention.

C. Alleged racial discrimination against particular Qatari media-related corporations

37. Mr. President, Members of the Court, I will turn now to Qatar's third claim, which concerns the UAE's differential treatment of seven Qatari media-related corporations. Ms Albastaki has already explained the context of the measures and, in particular, that the UAE blocked these websites for violating its content standards[83]. Yet, Qatar contends that the UAE has racially discriminated against these Qatari corporations through "silencing Qatari media"[84] and by interfering with their exercise of freedom of expression.

38. As Sir Daniel indicated, in so far as Qatar complains of measures that address Qatari corporations, rather than individuals, they fall outside the scope of the CERD.

39. It is clear that the CERD protects only *real persons* from racial discrimination, and not legal persons such as corporate entities. The preamble of the Convention refers to "discrimination between *human beings* on the grounds of race, colour or ethnic origin". Furthermore, Article 14 of the Convention, which concerns individual communications, suggests that only "individuals or groups of individuals" can be victims of racial discrimination.

40. In addition, the Convention's prohibited grounds of discrimination of "race, colour, descent, or national or ethnic origin" are inapposite to a corporation, including as they speak to the inherent characteristics of the human being. None of these grounds, including national origin, can be sensibly applied to a purely abstract legal entity.

41. Despite this, Qatar tries to justify its position by reference to Article 2 (1) *(a)* of the Convention. It notes that the obligation under the Convention to not engage in racial discrimination against "persons, groups of persons, or *institutions*", and it argues that the reference to "institutions" is grounds for an obligation to protect corporations[85]. Yet, unsurprisingly, the history and subsequent practice of the CERD Convention and Committee does not reveal a case in which a

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[83] See ***Al Bastaki*** above.

[84] AQ, para. 65 c. and paras. 53-64.

[85] MQ, para. 5.150.

corporation was considered to enjoy protection ***against*** racial discrimination. Qatar's claim for such human rights for corporations is one which no one else has advanced, and for understandable reasons.

42. The object and purpose of the Convention's reference to "institutions" is to protect groups of individuals who exercise their rights in common with others, such as through the medium of a collective body. This is well reflected in communications before the CERD Committee brought by various non-profit organizations, including the Central Council of German Sinti and Roma[86], the Jewish Community of Oslo[87] and the Turkish Union of Berlin/Brandenburg[88].

43. In sum, the UAE's measures against the seven Qatari media-related corporations were based on violations of the UAE's content standards. It is impossible, even if Qatar's alleged facts were accepted as true, to conceive of these Qatari corporations as having rights against racial discrimination under the Convention.

D. Alleged incitement to racial discrimination

44. Mr. President, Members of the Court, I will turn now to Qatar's fourth claim against the UAE concerning its alleged State responsibility for incitement to racial discrimination.

45. Qatar contends that the UAE has failed to condemn and indeed encouraged racial hatred against Qataris. It further alleges that the UAE failed to "take measures that aim to combat prejudices, including by *inter alia*: criminalizing the expression of sympathy toward Qatar and Qataris; allowing, promoting, and financing an international anti-Qatar public and social-media campaign . . . and calling for physical attacks on Qatari entities"[89].

46. However, the facts alleged by Qatar and put into the record, even if accepted, do not fall within the scope of racial discrimination under Article 1 (1) of the CERD. As I will demonstrate, Qatar's interpretation would turn many everyday instances of global and national conduct into breaches of international law, and conduct that must be criminalized.

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[86] CERD Communication No. 38/2006, *Zentralrat Deutscher Sinti und Roma et al.* v. *Germany*, Opinion of 22 Feb. 2008, doc. CERD/C/72/D/38/2006.

[87] CERD Communication No. 30/2003, *Jewish Community of Oslo et al.* v. *Norway*, Opinion of 15 Aug. 2005, doc. CERD/C/67/D/30/2003.

[88] CERD Communication No. 48/2010, *TBB-Turkish Union in Berlin/Brandenburg* v. *Germany*, Opinion of 26 Feb. 2013, doc. CERD/C/82/D/48/2010.

[89] AQ, para. 65.c.

47. Qatar's primary allegation of incitement or promotion of racial discrimination is based on the UAE's legislation in combination with the Attorney General's announcement. Qatar calls the legislation the Anti-Sympathy Law[90]. This legislation, Federal Decree-Law No. 5 on Combating Cybercrimes, was adopted in 2012. There was no criminalizing of sympathy for Qatar, as Qatar asserts[91] and, further, there were no amendments at the time to this UAE legislation. Moreover, the most relevant article of this federal decree actually prohibits the incitement of racism, rather than promotes it[92]. You will find the relevant article of the UAE legislation at tab 15 of the judges' folders.

48. The announcement by the UAE Attorney General on 7 June 2017 related to those who expressed sympathy for the State of Qatar. It did not relate to those of Qatari national origin. The announcement referred to expressions of "sympathy to the State of Qatar or any objection to the position of the UAE or other countries that have taken firm positions against the Government of Qatar". The announcement must not, as Qatar seeks to do, be artificially severed from the context of the Declaration of 5 June 2017, which was controlling and occurred only two days prior.

49. That declaration provides the proper context for the Attorney General's announcement, namely, the UAE's conviction that Qatar supports terrorism, extremism and intervention. The Attorney General's message suggests that to support Qatar is to support that position. In addition, and consistent with the Attorney General's message, the UAE disapproval of the State of Qatar's policies is juxtaposed with a message of respect for the Qatari people. As explained by Ms ***Al Bastaki***, the Declaration makes this point very clear; the UAE affirms its respect for the brotherly Qatari people, on account of the historical, religious and fraternal ties and family relations which bind the UAE and Qatari people[93].

50. To advance its claims, Qatar alleges three instances of the UAE authorities' action to arrest or otherwise discriminate against individuals pursuant to the non-existent Anti-Sympathy Law and the Attorney General's announcement. The UAE strongly refutes these alleged incidents.

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[90] MQ, para. 1.7.

[91] AQ, paras. 36 and 62; MQ, paras. 2.36-2.40.

[92] MQ, Vol. II, Ann. 38, Federal Decree Law No. 5 of 2012 on Combating Cybercrimes (UAE), Art. 24.

[93] See above, Albastaki, p. 17, para. 4; see Exh. 14 of the documents deposited by the UAE on 25 June 2018 in the context of Qatar's 11 June 2018 request for the indication of provisional measures.

However, even if Qatar's alleged facts in this regard were accepted, it would merely confirm the UAE took action against two UAE nationals and a British national[94]. There is no alleged connection to individuals of Qatari national origin and, therefore, no reason to conclude that these allegations fall within Article 1 (1) of the Convention.

51. Qatar also alleges that the UAE was responsible for hacking of the Qatari News Agency and placing a story that attributed statements to the Qatari Emir relating to Hezbollah, Hamas and President Trump[95]. The UAE strongly rejects this allegation, but even if it were accepted as fact, it would not fall within the scope of the Convention. In short, it does not involve any discrimination based on "race, colour, descent, or national or ethnic origin".

52. In addition, Qatar alleges that football fans booing the Qatari football team and throwing sandals and bottles on the football pitch is conduct that constitutes racial discrimination and involves the State responsibility of the UAE under the Convention[96]. Upholding this Qatari claim would amount to massively enlarging the Convention's scope and, consequently, the scope of criminal laws. It would also seriously strain the States parties' consent which underpins the Court's exercise of jurisdiction.

53. There are numerous other examples of alleged facts, on the basis of which Qatar claims the UAE's State responsibility for promoting or inaction against statements critical of the State of Qatar or its leaders, particularly due to their support for terrorism[97]. It is worth recounting how Qatar itself frames this allegation; it complains of

> "anti-Qatar press articles and caricatures published in Emirati and other GCC media since June 2017. This anti-Qatari propaganda campaign includes media attacks on Qatar by Emirati officials and other prominent Emiratis, as well as the establishment of fake news sites and social media accounts that disseminate false news accusing Qatar of support for terrorism and other nefarious behavior."

54. The import of Qatar's claims is clear and serious; that the public criticism of another State for its policies amounts to prohibited racial discrimination and it must be criminalized under Article 4 *(a)* of the Convention.

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[94] AQ, para. 38; MQ, paras. 2.40 and 2.41.

[95] MQ, para. 2.26.

[96] MQ, para. 2.59.

[97] MQ, paras. 2.48, 2.50 and 5.179.

55. Mr. President, the UAE does not deny any responsibility for adverse comments directed towards the State of Qatar and its behaviour, nor indeed that others within its territory may have made similar comments against the State of Qatar. As Ambassador Alnaqbi indicated, there were imperfections in the way the severance of relations was implemented at the outset. However, this is unequivocally *not* racial discrimination; it is not within the scope *ratione materiae* of the Convention.

V. Conclusion

56. Mr. President, Members of the Court***, in*** conclusion, the UAE's measures complained of by Qatar expressly and directly implicate differentiation based on nationality. This is not a prohibited ground of racial discrimination within the scope of the Convention. It is clear that Qatari nationals are not a protected group under the Convention.

57. Qatar's allegations do not disclose a claim that falls within the scope *ratione materiae* of the Convention. Qatar has tried to sidestep the obvious focus of the UAE's measures on the State of Qatar and its nationals. Yet, it well understands that the UAE's measures are not, and were never, about "national origin".

58. The UAE position has always been that the purpose of the measures was to withdraw certain privileges of friendship. As such, the common ground between the Parties is that the purpose and effect of the UAE's measures directly implicated the Qatari State and its foreign policy, with a consequent effect on Qatari nationals. Individuals of Qatari national origin are subject to the UAE's measures *only* if, and to the extent that, they are Qatari nationals.

59. In that context, the UAE respectfully requests that, whatever may be the view about the UAE's decisions and actions that are beyond the scope of the Convention, the Court should not allow Qatar to mischaracterize this dispute as being one that is defined ***as*** racial discrimination.

60. Mr. President, Members of the Court, that concludes my presentation and I thank you for your attention. Mr. President, may I ask you to invite Professor Forteau to address the UAE's submissions on admissibility under Article 22.

The PRESIDENT: I thank Mr. Sheeran for his statement. Je donne à présent la parole à M. Mathias Forteau. Vous avez la parole.

M. FORTEAU : Je vous remercie, Monsieur le président. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs de la Cour, c'est un privilège — même par écrans interposés — de me présenter aujourd'hui devant vous au nom des Emirats arabes unis.

L'INCOMPETENCE DE LA COUR EN RAISON DU NON-RESPECT DES PRECONDITIONS PROCEDURALES DE L'ARTICLE 22

1. Mesdames et Messieurs les juges, vous venez d'entendre les raisons pour lesquelles la Cour n'a pas compétence *ratione materiae*. Mais en réalité, il ne vous est pas nécessaire de vous prononcer sur ce point dès lors que, de toute manière, les préconditions procédurales imposées par l'article 22 de la convention n'ont pas été respectées par le Qatar, ce qui suffit à emporter l'incompétence de la Cour. Tel est l'objet de la seconde exception préliminaire des Emirats arabes unis, qui constituera l'objet de ma plaidoirie — je tiens dès maintenant à préciser que cette exception préliminaire demeure pleinement valide, y compris depuis votre décision récente dans l'affaire *Ukraine c. Russie* relative au caractère alternatif des préconditions de l'article 22, et ce, pour les raisons décisives que je développerai un peu plus tard dans ma plaidoirie.

2. L'article 22 de la CIEDR est une disposition que la Cour connaît désormais très bien — vous en trouverez le texte, avec l'ensemble de la convention, à l'onglet n° 1 de vos dossiers. Pour rappel, en vertu de cette disposition, la Cour ne peut être saisie d'un différend «touchant l'interprétation ou l'application de la présente Convention» *que si* ce différend «*n'a[] pas été réglé* par voie de négociation ou au moyen des procédures expressément prévues par ladite Convention» — ces procédures «expressément prévues» renvoyant à la procédure de réclamation interétatique organisée aux articles 11 à 13 de la convention.

3. Les termes clairs de l'article 22 suffisent à fonder la seconde exception préliminaire. Comme cela est parfaitement établi dans la jurisprudence de la Cour, la clause compromissoire de l'article 22 impose de véritables préconditions procédurales, que le demandeur a donc *l'obligation*

de respecter[98]. Or, le Qatar n'a pas respecté ces préconditions : dès lors en effet qu'il a pris l'initiative de soumettre le règlement du différend aux procédures expressément prévues par la convention, il ne lui était pas possible de saisir la Cour avant qu'il soit possible de dire si ces procédures ont, ou n'ont pas permis, de régler le différend entre les Parties. Or, tel est précisément ce qu'a fait le Qatar (I), ce qui entraîne l'incompétence de la Cour (II).

I. Les circonstances procédurales pertinentes

4. Les circonstances procédurales de la présente affaire sont bien entendu décisives pour déterminer comment s'applique en l'espèce l'article 22 de la convention. C'est donc par ces circonstances procédurales que je commencerai. Cinq éléments les caractérisent.

a) Premièrement, la procédure de réclamation interétatique des articles 11 à 13 de la convention *a été déclenchée* en la présente affaire.

b) Deuxièmement, cette procédure a été déclenchée *par le Qatar*.

c) Troisièmement, cette procédure a été déclenchée par le Qatar *avant* toute tentative de négociation concernant un différend relatif à la convention sur la discrimination raciale.

d) Quatrièmement, cette procédure a été déclenchée par le Qatar *avant* votre saisine.

e) *Mais*, cinquièmement, le Qatar a saisi la Cour *avant* que la procédure des articles 11 à 13 arrive à son terme ; celle-ci est d'ailleurs toujours en cours, les Parties étant, à l'heure actuelle, engagées dans le processus visant à trouver un règlement amiable aux questions qui les divisent sous l'égide de la Commission de conciliation instituée en vertu de la convention.

5. Ces différents éléments ne prêtent aucunement à débat. Il est établi en effet[99] :

a) que le Qatar a déclenché la procédure des articles 11 à 13 le 8 mars 2018[100] ;

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[98] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 128, par. 141, et p. 140, par. 183 ; *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*, p. 125, par. 59, et *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), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (II)*, par. 106 ; mémoire du Qatar (MQ), par. 3.115-3.116.

[99] Voir exceptions préliminaires des Emirats arabes unis (EPEAU), par. 196.

[100] Comité CERD, décision sur la compétence sur la communication interétatique soumise par le Qatar contre les Emirats arabes unis, CERD/C/99/3, 27 août 2019, par. 4 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), mesures conservatoires, ordonnance du 23 juillet 2018, C.I.J. Recueil 2018 (II)*, p. 420, par. 39.

b) que la plainte du Qatar a commencé à être examinée par le Comité CERD à sa session qui a suivi, le 23 avril 2018[101] ;

c) que ce n'est qu'ensuite, le 25 avril 2018, que le Qatar a, selon les mots de la Cour, «formulé une offre … de négocier … au sujet du respect … des obligations de fond qu[']impose la CIEDR»[102];

d) il est tout autant établi que le 11 juin 2018, soit quelques semaines après le dépôt de sa plainte auprès du Comité, le Qatar a saisi la Cour[103] ; et

e) il est tout autant établi que les tentatives de régler le différend au moyen des procédures des articles 11 à 13 sont toujours actives, et l'étaient donc *a fortiori* au moment où la Cour a été saisie.

6. Le fait est que le Qatar a saisi la Cour avant même d'attendre que la toute première étape de la procédure des articles 11 à 13 soit achevée.

a) Le Comité CERD a transmis la plainte du Qatar aux Emirats arabes unis le 7 mai 2018[104], ce qui impliquait qu'à partir de cette date, les Emirats arabes unis disposaient, en application de la convention, d'un délai de trois mois, jusqu'au 7 août 2018, pour formuler leurs premières observations sur la plainte du Qatar[105].

b) Or, le Qatar a saisi la Cour le 11 juin 2018, au moment donc où la procédure devant le Comité venait à peine de commencer[106].

7. Cette attitude du Qatar contraste avec le fait que c'est *le Qatar* qui a déclenché la procédure des articles 11 à 13, de sa propre volonté et de sa seule initiative. On doit présumer d'une telle décision qu'elle a été adoptée par le Qatar de bonne foi, dans l'objectif sincère de voir aboutir la procédure de règlement amiable expressément prévue par la convention. Une telle décision du

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[101] Voir EPEAU, par. 196 *a)*.

[102] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), mesures conservatoires, ordonnance du 23 juillet 2018, C.I.J. Recueil 2018 (II)*, p. 420, par. 38 ; MQ, vol. II, annexe 68.

[103] Voir la requête introductive d'instance du 11 juin 2018 (RQ).

[104] Voir EPEAU, par. 196 *c)* et par. 209-210.

[105] Voir article 11, paragraphe 1, de la CIEDR ; ainsi que https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23566&LangID=E.

[106] Voir EPEAU, par. 197 ; voir aussi CR 2019/5, p. 30-32, par. 11-16 (Reisman).

Qatar exige, comme l'impose le droit international[107], qu'il suive jusqu'à son terme les différentes étapes de la procédure des articles 11 à 13 et qu'il en utilise toutes les potentialités dans un esprit constructif[108]. Pour paraphraser l'arrêt de la Cour dans l'affaire des *Usines de pâte à papier*, la procédure des articles 11 à 13 «n'aurait pas de sens … si [l'Etat qui la déclenche agit] sans attendre que ce mécanisme soit mené à son terme»[109] ; cette procédure serait dans ce cas privée d'objet[110], et les dispositions qui la gouvernent seraient privées de tout effet utile. Comme le Comité CERD l'a indiqué à son tour, la procédure des articles 11 à 13 «provides a unique instrument to settle inter-State disputes, set up for the common good of all States parties» and this procedure «should be implemented in a manner that is practical, constructive and effective»»[111].

8. Je note d'ailleurs que le 29 octobre 2018 (soit quatre mois *après* la saisine de la Cour), le Qatar a réitéré sa demande au Comité en application de l'article 11, paragraphe 2, de la convention[112]. Cela montre qu'à ses propres yeux, les tentatives de régler le différend au moyen de la procédure des articles 11 à 13 gardaient à cette date tout leur sens et devaient continuer ; cela montre que même après que la Cour a été saisie, le Qatar a continué d'estimer que le différend pouvait — et peut d'ailleurs encore — être réglé au moyen des procédures prévues par la convention. Je note dans le même sens que c'est le Qatar également qui a spécifiquement demandé, par la suite, la constitution de la Commission de conciliation, comme cela ressort expressément de sa réponse écrite au Comité CERD en date du 14 février 2019, ce qui confirme que le Qatar a toujours estimé, même après la saisine de la Cour, que les procédures des articles 11 à 13 peuvent permettre de régler le différend[113].

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[107] Nations Unies, Assemblée générale, Déclaration de Manille sur le règlement pacifique des différends internationaux, 15 novembre 1982, doc. A/37/10, annexe, notamment par. 11.

[108] EPEAU, par. 212-213.

[109] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 67, par. 147.

[110] *Ibid.*

[111] CERD, Inter-State communication submitted by the State of Palestine against Israel, décision du 12 décembre 2019, CERD/C/100/5, par. 3.41 et 3.50 *f)*.

[112] Comité CERD, décision sur la compétence sur la communication interétatique soumise par le Qatar contre les Emirats arabes unis, CERD/C/99/3, 27 août 2019, par. 5.

[113] Voir EPEAU, vol. II, annexe 18, p. 459, par. 205.

II. L'absence de respect des préconditions procédurales de l'article 22

9. Monsieur le président, ces précisions importantes étant données, j'en viens aux préconditions procédurales de l'article 22 et à leur application en la présente instance.

A. Le sens et la portée juridiques de l'article 22

10. Je commencerai par rappeler quelle est la portée juridique que la Cour assigne à ces préconditions procédurales et je ferai quatre remarques à ce propos :

a) Premièrement : l'article 22 doit être lu pour ce qu'il est, à savoir une disposition qui établit certes, *mais en le limitant*, le consentement des Etats à la compétence de la Cour : comme la Cour l'a souligné, «le recours préalable à des négociations ou à d'autres modes de règlement pacifique des différends [qu'impose l'article 22] joue un rôle important en ce qu'il indique les limites du consentement donné par les Etats»[114]. Dans ce contexte, la Cour a précisé que, à l'époque où la convention a été rédigée, «l'idée de consentir au règlement obligatoire des différends par la Cour n'était pas facilement acceptable pour nombre d'Etats»[115]. Il faut donc prendre ces limites très au sérieux.

b) Deuxièmement : l'article 22 établit «des conditions procédurales auxquelles il *doit* être satisfait avant toute saisine de la Cour»[116] ; elles sont donc juridiquement obligatoires.

c) Troisièmement, la Cour a souligné l'importante raison d'être des préconditions procédurales de l'article 22 : leur raison d'être est d'«incite[r] les parties à tenter de régler leur différend à l'amiable, évitant ainsi de s'en remettre au jugement contraignant d'un tiers»[117].

d) Quatrièmement, votre jurisprudence exige de donner effet utile à l'article 22[118].

11. C'est à la lumière de ces éléments que doivent se lire les termes de l'article 22. En vertu de cette disposition, je le rappelle, la Cour n'a compétence *que si* le différend «*n'a[] pas été réglé* par voie de négociation ou au moyen des procédures expressément prévues par ladite Convention». Ces termes sont tout à fait clairs. Ils signifient, selon votre propre jurisprudence, qu'«une action

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[114] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 125, par. 131.

[115] *Ibid.*, p. 129, par. 147.

[116] *Ibid.*, p. 128, par. 141.

[117] *Ibid.*, p. 124, par. 131.

[118] *Ibid.*, p. 125-126, par. 133-134.

préalable (une tentative de régler le différend) doit avoir *été accomplie avant* qu'une autre action (la saisine de la Cour) puisse être engagée»[119]. Cela implique que tant que les procédures expressément prévues par la convention sont en cours, il n'est pas possible de saisir votre haute juridiction. Pour pouvoir déterminer en effet si le différend a été ou non *réglé* au moyen des procédures prévues par la convention, il faut nécessairement attendre de savoir si ces procédures ont permis ou non de régler ce différend, ce qu'il est impossible de faire tant qu'elles sont encore actives. Il découle naturellement de ces différents éléments que lorsque les procédures expressément prévues par la convention ont été déclenchées par le demandeur, comme c'est le cas en l'espèce, celles-ci doivent être menées à leur terme avant de pouvoir saisir la Cour. Toute autre interprétation de l'article 22 aurait pour conséquence de priver de tout effet utile, non seulement l'article 22, mais par ricochet les procédures des articles 11 à 13 de la convention ; et cela aurait par là-même pour conséquence de contourner les limites au consentement à la compétence de la Cour instituées à l'article 22.

12. Cette conclusion est confortée par plusieurs autres éléments.

13. C'est tout d'abord une jurisprudence bien établie de la Cour que

> «[p]our être en mesure de déterminer si elle a compétence dans la présente affaire, la Cour doit rechercher «si la force des raisons militant en faveur de sa compétence est prépondérante et s'il existe «une volonté des Parties de [lui] conférer juridiction»» (*Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 76, par. 16, citant *Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 32 ; voir également *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 450-451, par. 38).»[120]

14. En l'espèce, les raisons prépondérantes militent en faveur de l'exception préliminaire des Emirats arabes unis.

15. Pour commencer, selon une jurisprudence maintes fois réaffirmée par la Cour,

> «le règlement judiciaire des conflits internationaux, en vue duquel la Cour est instituée, n'est qu'un succédané au règlement direct et amiable de ces conflits entre les

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[119] *Ibid.*, p. 126, par. 135 (les italiques sont de nous).

[120] *Délimitation maritime dans l'océan Indien (Somalie c. Kenya), exceptions préliminaires, arrêt, C.I.J. Recueil 2017*, p. 45, par. 116.

> Parties ; … dès lors, il appartient à la Cour de faciliter, dans toute la mesure compatible avec son Statut, pareil règlement direct et amiable»[121].

16. Deux éléments sont importants ici : d'une part, le caractère subsidiaire de la compétence de la Cour par rapport au règlement amiable ; d'autre part, la nécessité pour elle de faciliter en conséquence le règlement amiable des litiges. Votre Cour ne manque pas d'ailleurs en ce sens d'exprimer son «regret» lorsque des Etats ne sont pas parvenus à régler par accord leur différend et se tournent vers elle par défaut[122].

17. L'exigence de faciliter le règlement amiable des litiges prévaut à plus forte raison lorsque la convention donnant compétence à la Cour organise elle-même, et cela «expressément» selon les termes de l'article 22, une procédure de règlement amiable. La raison d'être et la fonction des préconditions de l'article 22 sont précisément de faciliter autant qu'il est possible, avant de saisir la Cour, le règlement amiable des litiges. Comme la Cour l'a souligné dans l'affaire *Géorgie c. Russie* et comme je l'ai rappelé il y a quelques instants, les préconditions de l'article 22 «incite[nt] les parties à tenter de régler leur différend à l'amiable, évitant ainsi de s'en remettre au jugement contraignant d'un tiers»[123]. Les juges dissidents dans cette affaire ont estimé dans le même sens que la nécessité d'épuiser d'abord les procédures visées à l'article 22 n'a pas seulement comme finalité une «finalité … formelle ; la règle vise … un objectif raisonnable, celui de réserver le règlement judiciaire aux différends qui ne peuvent pas être résolus par une méthode extrajudiciaire reposant sur l'accord des parties»[124].

18. J'ajoute que tant que les procédures expressément prévues par la convention sont actives, la Cour n'est pas en mesure de déterminer s'il y a, au sens de la convention, un différend à trancher, ou quels sont les éléments de celui-ci qui demeurent non réglés. Or, «[l]'existence d'un

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[121] *Zones franches de la Haute-Savoie et du Pays de Gex, ordonnance du 19 août 1929, C.P.J.I. série A n° 22,* p. 13 ; *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969,* p. 47, par. 87 ; *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986,* p. 577, par. 46 ; *Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991,* p. 20, par. 35 ; *Incident aérien du 10 août 1999 (Pakistan c. Inde), compétence de la Cour, arrêt, C.I.J. Recueil 2000,* p. 33, par. 52.

[122] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), indemnisation, arrêt, C.I.J. Recueil 2018 (I),* p. 57, par. 150.

[123] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I),* p. 124, par. 131.

[124] *Ibid.*, opinion dissidente commune de M. le juge Owada, président, et de MM. les juges Simma, Abraham, Mme la juge Donoghue et M. le juge *ad hoc* Gaja, p. 156, par. 43.

différend est … la condition première de l'exercice de sa fonction judiciaire»[125] — la Cour l'a rappelé dans l'affaire Burkina Faso/Niger, et ceci a un effet direct sur l'application de l'article 22. En vertu de cet article, je le rappelle, seuls les différends *qui n'ont pas été réglés* de manière amiable peuvent être portés devant la Cour et, comme les Emirats arabes unis l'ont déjà fait valoir, «on ne peut évidemment pas déterminer que le différend «n'aura pas été … réglé au moyen» de ces procédures si la Cour se prononce avant même que ce différend ait été examiné dans le cadre de ces procédures»[126]. De ce point de vue, le Qatar a tort de soutenir dans ses écritures que «l'issue de la procédure devant le Comité [CERD] ne saurait avoir la moindre incidence sur la compétence de la Cour pour parvenir à ses propres conclusions concernant les faits et le droit»[127]. Tout au contraire, dès lors que les procédures des articles 11 à 13 ont été activées (et je rappelle qu'elles l'ont été à l'initiative du demandeur), ces procédures ont nécessairement un impact sur la compétence et la fonction juridictionnelle de la Cour.

19. Ces considérations sont renforcées par des principes plus généraux de procédure : qu'il s'agisse du principe *electa una via* ou du principe de litispendance, l'inspiration est la même : le règlement harmonieux des différends doit conduire à éviter l'introduction de procédures parallèles à propos d'une seule et même affaire. Comme Sir Daniel l'a indiqué tout à l'heure, les Emirats arabes unis ne se fondent pas sur ces principes en tant que tels ; ce n'est pas nécessaire en effet, dès lors que les termes de l'article 22 sont suffisamment clairs et sans ambiguïté. Il n'en demeure pas moins que ces principes viennent conforter le sens et la portée juridiques de l'article 22 que je viens de présenter.

20. Ces principes, applicables en droit interne, valent tout autant en droit international. Le professeur McLachlan a ainsi montré dans son cours à l'Académie de La Haye que la litispendance est un principe général de droit[128]. En réponse aux éléments de jurisprudence invoqués dans le même sens au stade des mesures conservatoires[129], le professeur Lowe, intervenant au nom du

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[125] *Différend frontalier (Burkina Faso/Niger), arrêt, C.I.J. Recueil 2013*, p. 70, par. 48.

[126] CR 2018/13, p. 27, par. 23 (Pellet).

[127] Exposé écrit du Qatar sur les exceptions préliminaires (EEQ), par. 4.19.

[128] C. McLachlan, «Lis Pendens in International Litigation», Recueil des cours de l'Académie de droit international de La Haye/Collected Courses of the Hague Academy, 2008, vol. 336, p. 461-463.

[129] CR 2018/13, p. 27, par. 23 (Pellet).

Qatar, a fait part de ses doutes quant à l'existence d'un tel principe de litispendance en droit international[130]. Je note toutefois que dans un article publié en 1999, le même professeur Lowe embrassait la conclusion du professeur McLachlan, en soulignant que ce principe est bien commun à tous les systèmes juridiques et peut être appliqué par tout tribunal, y compris dans l'ordre international[131].

21. Ces principes généraux de procédure s'appliquent à plus forte raison lorsque les deux procédures concurrentes sont prévues par une seule et même convention, à plus forte raison encore lorsque cette même convention désigne l'une de ces procédures comme étant «expressément prévues» par elle[132], et à plus forte raison encore lorsqu'il existe une clause compromissoire qui érige ces procédures en préconditions procédurales à la saisine de la Cour, comme le fait l'article 22.

B. Les contre-arguments du Qatar sont sans fondement

22. Monsieur le président, la force de ces différents éléments explique certainement pourquoi le Qatar est resté très évasif sur cette question dans ses écritures. Le Qatar se limite à opposer trois arguments à la présente exception préliminaire, ***trois arguments*** qui sont chacun irrecevables.

23. Le Qatar affirme *tout d'abord* que ce ne serait pas le même différend qui aurait été porté devant le Comité et la Commission de conciliation au titre des articles 11 à 13 et devant la Cour au titre de l'article 22 et que, par conséquent, ces procédures ne se feraient pas concurrence. Cette affirmation défie le bon sens. Sir Daniel a déjà répondu tout à l'heure à cet argument du Qatar. Je me bornerai pour ma part à souligner qu'il ne fait aucun doute que le différend soumis par le Qatar aux procédures des articles 11 à 13 a le même objet que le différend soumis à la Cour : comme les Emirats arabes unis l'ont montré dans leurs écritures, je n'y reviens donc pas[133],

a) ces différends concernent les deux mêmes Etats ;

b) ils concernent la même convention ;

c) ils concernent les mêmes droits et obligations ;

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[130] CR 2019/6, p. 22, par. 30 (Lowe).

[131] Voir ***V.*** Lowe, «Overlapping Jurisdiction in International Tribunals», *Australian Yearbook of International Law*, 1999, vol. 20, p. 202-203.

[132] Voir EPEAU, par. 157.

[133] Voir EPEAU, par. 205-208.

d) ils concernent les mêmes faits ;

e) et ils visent l'un et l'autre, selon le Qatar, à faire respecter la convention ;

f) en d'autres termes, il s'agit clairement *du même différend*.

24. Le Qatar plaide *ensuite* que, quand bien même il a déclenché la procédure de réclamation interétatique, il suffirait qu'il ait épuisé les négociations pour que la Cour ait compétence. Cet argument, à son tour, est mal-fondé à plusieurs égards.

25. En tout premier lieu, il est faux de prétendre que le Qatar aurait tenté de bonne foi de régler le différend par le biais de négociations[134]. Certes, la Cour a indiqué dans sa première ordonnance en mesures conservatoires que la précondition des négociations préalables aurait été remplie[135]. Mais la Cour l'a fait *prima facie* seulement, en entourant sa conclusion de la nuance requise — la Cour se bornant à conclure au vu des éléments alors à sa disposition que cette précondition «*appara[ît], à ce stade*, avoir été rempli[e]»[136] — la Cour a rappelé par ailleurs que sa décision sur les mesures conservatoires «ne préjuge en rien la question de sa compétence pour connaître du fond de l'affaire»[137]. Dans leurs exceptions préliminaires, les Emirats arabes unis ont depuis montré que le Qatar n'a pas respecté la précondition des négociations préalables au titre de l'article 22 de la convention — je me permets très respectueusement de vous renvoyer à cet égard aux passages pertinents de nos écritures, dont les références figurent en note de ma plaidoirie[138].

26. En **second** lieu, et quoi qu'il en soit, l'argument du Qatar selon lequel il lui aurait suffi de tenter de négocier est en tout état de cause inopérant en l'espèce. Certes, la Cour a jugé dans l'affaire *Ukraine c. Russie* que l'article 22 impose des préconditions alternatives et non cumulatives[139]. Mais cela est sans effet ici :

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[134] Voir MQ, par. 3.158-3.191 ; EEQ, par. 3.45-3.59.

[135] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), mesures conservatoires, ordonnance du 23 juillet 2018, C.I.J. Recueil 2018 (II)*, p. 420, par. 38.

[136] *Ibid.*, p. 421, par. 40 (les italiques sont de nous).

[137] *Ibid.*, p. 433, par. 78.

[138] EPEAU, par. 179-203 et par. 221-228.

[139] *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), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (II)*, par. 113.

a) Tout d'abord, il ne s'agit pas ici de savoir si le demandeur *aurait dû* recourir aux procédures de la convention avant de saisir la Cour comme c'était le cas dans l'affaire *Ukraine c. Russie* ; la question qui se pose ici est de savoir si, *alors* qu'il *a décidé* de déclencher ces procédures, le Qatar peut saisir *en parallèle* la Cour.

b) Ensuite, ce que la Cour a décidé dans l'affaire *Ukraine c. Russie* est que le demandeur qui a épuisé les négociations n'est pas tenu, *dans un second temps*, de soumettre le différend aux procédures expressément prévues par la convention[140]. A nouveau, la situation est différente dans la présente affaire puisque ce sont les procédures des articles 11 à 13 qui ont été déclenchées en tout premier lieu.

c) Par ailleurs, dans l'affaire *Ukraine c. Russie,* la Cour a précisé que, s'il n'y a pas lieu d'imposer le recours aux articles 11 à 13 après l'échec des négociations, c'est parce qu'«il ne serait pas raisonnable d'imposer aux Etats parties ayant déjà échoué dans leur tentative de règlement par voie de négociation d'engager une *nouvelle* série de *négociations* conformément aux modalités prévues aux articles 11 à 13 de la CIEDR»[141]. Le Qatar affirme dans le même sens dans ses écritures que «Article 11(2) of the Convention expressly references negotiations *as part of the CERD procedures*»[142]. Cette précision est importante : il s'en déduit que lorsque le demandeur a fait le choix de déclencher d'abord la procédure des articles 11 à 13, il ne peut pas ensuite tenter de s'en libérer en prétendant que les négociations**,** auxquelles fait référence l'article 11, auraient échoué. Il doit au contraire dans ce cas tenter de régler le différend de bonne foi en utilisant tous les moyens, *et pas seulement la négociation*, qui sont organisés de manière successive par les articles 11 à 13 de la convention.

27. Pour contourner cet obstacle, le Qatar soutient dans ses écritures que les négociations auraient en réalité commencé avant le 8 mars 2018, date de saisine du Comité, en prétextant avoir émis avant cette date des préoccupations[143]. Ce faisant, le Qatar commet une confusion grossière. Selon une jurisprudence constante, de simples protestations ou accusations ne valent pas

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[140] *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), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (II)*, par. 110.

[141] *Ibid.*, par. 110 (les italiques sont de nous).

[142] EEQ, par. 3.57 (les italiques sont dans l'original).

[143] EEQ, par. 3.49 et suiv.

négociation[144]. C'est encore plus vrai lorsque lesdites protestations ou accusations, comme c'est le cas en l'espèce, ne comportent *aucune* référence *du tout* à la convention sur la base de laquelle on entend fonder votre compétence, ni même à l'objet de cette convention[145], à savoir la discrimination raciale. La Cour a constaté au stade des mesures conservatoires[146] que ce n'est que le 25 avril 2018, soit après la saisine du Comité, que le Qatar a formulé pour la première fois une «offre de négocier». La lettre du Qatar du 25 avril 2018 l'indique d'ailleurs expressément : elle constitue une «invitation à négocier» sur la CIEDR, et même plus précisément une invitation à «entrer en négociation»[147] ; et les conseils du Qatar vous ont précisé que cette lettre invitait les deux Etats à «commencer» les négociations sur la CIEDR[148] : or, lorsqu'on invite à entrer en négociations ou à les commencer, c'est bien, par définition, qu'elles n'avaient pas débuté avant cette invitation !

28. Le *troisième* argument du Qatar consiste à plaider que le précédent de l'affaire des *Actions armées frontalières et transfrontalières*[149]**,** invoqué par les Emirats arabes unis**,** ne serait pas pertinent en l'espèce, au motif que la CIEDR ne contiendrait pas une disposition analogue à l'article IV du pacte de Bogotá au terme duquel «lorsque l'une des procédures pacifiques aura été entamée, … il ne pourra être recouru à aucune autre avant l'épuisement de celle déjà entamée»[150]. S'il est vrai que l'article IV du pacte de Bogotá et l'article 22 de la CIEDR ne sont pas rédigés de la même manière, il n'en demeure pas moins qu'ils imposent la même règle substantielle, à savoir que seuls les différends qui n'ont pas pu être réglés par recours à d'autres modes de règlement des

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[144] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 127, par. 137, ainsi que p. 132, par. 157 ; *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 40-41, par. 91 ; *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), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (II)*, par. 116.

[145] Voir MQ, vol. II, annexes 50 à 67 ; EPEAU, par. 183-193 ; CR 2018/13, p. 23-24, par. 11-13 (Pellet) et CR 2018/15, p. 14-15, par. 11-12 (Pellet).

[146] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), mesures conservatoires, ordonnance du 23 juillet 2018, C.I.J. Recueil 2018 (II)*, p. 420, par. 38.

[147] Voir MQ, vol. II, annexe 68 («invitation to negotiate» ; «it is necessary to enter into negotiations»).

[148] CR 2018/12, p. 29-30, par. 39 (Donovan).

[149] Voir EPEAU, par. 236.

[150] EEQ, par. 4.8.

différends peuvent être soumis ensuite à la Cour. Comme la Cour l'a jugé, l'article 22 établit «des conditions préalables auxquelles il doit être satisfait avant toute saisine de la Cour»[151], ce qui suppose de s'assurer si ces procédures ont permis ou non, encore une fois, de régler à l'amiable le différend[152]. Dans l'affaire des *Actions armées*, la Cour a estimé par ailleurs que les conditions de l'article IV du pacte de Bogotá sont remplies lorsque «la procédure initiale se … trouv[e] à un point mort dans des conditions telles que ni sa continuation ni sa reprise n'a[] été effectivement envisagée à la date où une nouvelle procédure est engagée»[153]. Or, rien de tel ne s'est produit dans la présente affaire.

C. Les préconditions procédurales de l'article 22 n'ont pas été respectées en l'espèce

29. Cela me conduit à mon tout dernier point : doit-on considérer qu'en la présente instance, le différend «n'a[] pas été réglé … au moyen des procédures expressément prévues par ***[***la***] Convention***», comme l'exige l'article 22 ? La réponse est certainement négative.

30. Il faut tout d'abord rappeler que le respect de préconditions procédurales doit s'apprécier au jour de la saisine de la Cour[154] ; selon votre jurisprudence, «la question de savoir si une «procédure» particulière doit ou non être considérée comme «épuisée» [doit être en effet] examinée compte tenu de la situation au moment où la requête a été déposée à la Cour»[155], principe qui s'applique pleinement aux préconditions de l'article 22 comme la Cour l'a indiqué dans l'affaire *Géorgie c. Russie*[156]. A supposer d'ailleurs que cette jurisprudence constante soit écartée et que l'on doive se placer à une date ultérieure pour décider de la compétence de la Cour, ce que rien ne

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[151] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 128, par. 141.

[152] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 134, par. 163 ; *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), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (II)*, par. 117.

[153] *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 100, par. 80.

[154] *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, p. 12-13, par. 26.

[155] *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 106, par. 96, ainsi que p. 100, par. 79 ; voir également *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (II)*, p. 851, par. 42-43.

[156] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 134, par. 162.

justifierait, cela ne changerait de toute manière rien dans la présente affaire puisque la procédure des articles 11 à 13 est toujours pleinement active aujourd'hui.

31. Le fait que les tentatives de règlement amiable au moyen de la procédure des articles 11 à 13 soient toujours en cours se constate facilement, car cela se constate objectivement. En effet, la procédure des articles 11 à 13 est institutionnalisée et organisée de manière détaillée et séquencée par la convention et par les règles de procédure du Comité[157]. Les articles 11 à 13 définissent de manière précise et ordonnée les différentes étapes de la procédure à suivre, y compris par l'indication de délais. Tant que la procédure ainsi organisée n'est pas parvenue à son terme, il n'est évidemment pas possible de conclure que le différend «n'a pas été réglé» au moyen de cette procédure.

32. Quand bien même d'ailleurs il faudrait appliquer non pas ces critères objectifs, mais des critères plus subjectifs visant à évaluer si la procédure a «échoué», est «devenue inutile» ou a «abouti à une impasse»[158], le constat serait identique : la conduite et les déclarations des deux Parties montrent clairement qu'elles se sont, et continuent d'être, engagées de bonne foi dans les tentatives de régler leur différend au moyen des procédures expressément prévues par la convention.

a) A la suite de la plainte du Qatar au titre de l'article 11 de la convention, les Emirats arabes unis se sont engagés de bonne foi dans la procédure de règlement amiable ; ils ont à ce titre participé activement, comme le Qatar, à la procédure écrite et orale devant le Comité pour défendre leurs droits et intérêts[159].

b) A la suite des deux décisions du Comité d'août 2019 déclarant la demande du Qatar recevable, les deux Parties se sont engagées dans le processus de conciliation. Elles ont établi la Commission de conciliation sur le fondement de l'article 12, et cette Commission a officiellement pris ses fonctions en mars 2020.

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[157] Voir EPEAU, par. 161-165.

[158] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I),* p. 133, par. 159 ; *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), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (II),* par. 117.

[159] EPEAU, par. 216.

c) Les deux Parties ont par ailleurs l'une et l'autre exprimé clairement leur confiance et leur souhait d'aboutir dans ce processus de conciliation, comme en témoignent en particulier les notes verbales du 27 janvier 2020, du 10 février 2020 et du 27 avril 2020 citées par Sir Daniel plus tôt cet après-midi et qui figurent dans vos dossiers sous les onglets n^{os} 2, 3 et 4.

d) Il est en particulier intéressant de relever que le Qatar conclut la deuxième de ces notes verbales, celle du 10 février 2020, en indiquant qu'il «looks forward to engaging with the Commission and the UAE *to resolve the dispute between the parties*». En s'affirmant ainsi toujours prêt à s'engager pour «régler le différend entre les Parties» au moyen de la conciliation, le Qatar reconnaît nécessairement que le différend peut encore être réglé au moyen des procédures expressément prévues par la convention, ce qui était, à plus forte raison, vrai au moment où il a saisi la Cour. Compte tenu des termes clairs de l'article 22, il s'en déduit nécessairement que le Qatar n'a pas pu saisir valablement la Cour sur le fondement de l'article 22 et que la Cour n'a donc pas compétence en la présente instance.

Monsieur le président, Mesdames et Messieurs de la Cour, ceci conclut à la fois ma présentation et le premier tour de plaidoiries des Emirats arabes unis. Je vous remercie très sincèrement de votre attention, en mon nom propre et au nom de toute notre délégation. Je vous remercie, Monsieur le président.

The PRESIDENT: I thank Professor Forteau for his statement. Your statement brings to an end today's sitting. Oral argument on the preliminary objections raised by the United Arab Emirates will resume on Wednesday 2 September 2020 at 3 p.m., for Qatar's first round of pleading. The sitting is adjourned.

The Court rose at 6 p.m.