INTERNATIONAL COURT OF JUSTICE

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

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

WRITTEN STATEMENT OF THE STATE OF QATAR CONCERNING THE PRELIMINARY OBJECTIONS OF THE UNITED ARAB EMIRATES

VOLUME I

30 AUGUST 2019

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GLOSSARY OF ACRONYMS, ABBREVIATIONS AND DEFINED TERMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
CCC	Compensation Claims Committee
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GCC	Gulf Cooperation Council
GCC States	Member States of the GCC: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights

ILO Convention	International Labour Organization Convention
NHRC	Qatar National Human Rights Committee
Order	Request for the Indication of Provisional Measures, Order of 23 July 2018
Qatar	The State of Qatar
Qatar Application	Application Instituting Proceedings of the State of Qatar dated 11 June 2018
Qatar Memorial	Memorial of the State of Qatar dated 25 April 2019
Qatar RPM	Request for the Indication of Provisional Measures of Protection of the State of Qatar dated 11 June 2018
UAE	The United Arab Emirates
UAE Preliminary Objections	Preliminary Objections of the United Arab Emirates dated 29 April 2019
UAE RPM	Request for the Indication of Provisional Measures to Preserve the United Arab Emirates' Procedural Rights and to Prevent Qatar from Aggravating or Extending the Dispute dated 22 March 2019

UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties

CHAPTER I
INTRODUCTION

1.1 Pursuant to the Court's Order of 2 May 2019, the State of Qatar ("***Qatar***") submits its written statement of its observations and submissions ("***Written Statement***") on the preliminary objections raised by the United Arab Emirates ("***UAE***") on 29 April 2019 ("***Preliminary Objections***"). The Written Statement supplements the submissions of law and evidence put forward in Qatar's Memorial of 25 April 2019 ("***Memorial***").

1.2 The UAE requests that the Court "adjudge and declare that it does not have jurisdiction over Qatar's Application and that the Application is inadmissible" on the basis of three Preliminary Objections[1]. Specifically, the UAE argues that:

- *First*, the Court has no jurisdiction *ratione materiae* because its acts "have been directed at Qatari citizens on the basis of their *nationality*" and the International Convention on the Elimination of All Forms of Racial Discrimination (the "***CERD***")[2] "does not apply to differentiation on the basis of *nationality*";

- *Second*, the Court "could only have jurisdiction . . . if negotiation and the procedures provided under Articles 11 to 13 of the Convention have both been pursued as far as possible and neither has resulted in settlement of the

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1 *See* UAE Preliminary Objections, p. 8, para. 16.

2 **Memorial Vol. III, Annex 92**, United Nations General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 660 United Nations, *Treaty Series* 195 (21 December 1965) (hereinafter "CERD").

dispute", but "Qatar failed to satisfy either of these preconditions before filing its Application"; and

- *Third*, "[t]he initiation of parallel proceedings before the Court in respect of the same dispute whilst the Article 11 procedure was pending before the CERD Committee constitutes an abuse of process, rendering Qatar's Application inadmissible"[3].

1.3 The UAE has abandoned its claim, made at the provisional measures stage, that Qatar's Application was inadmissible because Qatar was required to exhaust local remedies before seizing the Court of the dispute, but allegedly failed to do so[4].

1.4 None of the UAE's objections provides a basis for the Court to deny its jurisdiction over or declare inadmissible Qatar's claims. To the contrary, on the basis of Article 22 of the CERD, the Court's jurisprudence, and the evidence Qatar has submitted, the Court should proceed promptly to the merits.

Section I. Observations on the UAE's Approach

1.5 The UAE's Preliminary Objections adhere to what is by now its standard line. The UAE seeks to avoid the international responsibility that follows from its deliberate discrimination against Qataris by mischaracterizing its actions and disregarding Qatar's evidence. In particular, the UAE once again argues that

[3] *See* UAE Preliminary Objections, p. 7, para. 15.

[4] CR 2018/13, pp. 28–34, paras. 1–25 (Treves).

despite the exhaustive evidence documenting the UAE's collective expulsion of Qataris and the raft of fundamental human rights violations that followed, Qatar's claims do not found a human rights case implicating racial discrimination under the CERD. Rather, as the UAE would have it, this is a case about "basic immigration control[s]"[5] directed at "current" Qatari nationals[6], with which the Court need not concern itself.

1.6 The record before the Court reflects a far different reality. By its Application and Request for Provisional Measures filed 11 June 2018, Qatar demonstrated that the UAE's Discriminatory Measures were, at a minimum, *prima facie* capable of falling within the provisions of the CERD[7]. Indeed, the Court found it necessary to indicate provisional measures in order to protect the rights of Qataris pending a decision on the merits of Qatar's claims[8]. Then, by its Memorial filed 25 April 2019—that is, before the Preliminary Objections—Qatar made good on its allegations by demonstrating, first, that the Court has jurisdiction over Qatar's claims, and second, that the UAE's Discriminatory Measures have had far-reaching and devastating impacts on the protected rights of Qataris, in violation of the CERD. Qatar supported its case with over 350 pages of legal analysis, 109 witness statements, and six volumes of documentary evidence[9].

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5 UAE Preliminary Objections, p. 29, para. 47.

6 UAE Preliminary Objections, p. 37, para. 64.

7 *See generally* Qatar Application; Qatar RPM. Any terms not defined in the Written Statement have the meaning assigned to them in the Memorial.

8 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Order of 23 July 2018*, p. 25, para. 72.

9 *See generally* Qatar Memorial.

1.7 In the face of that showing, the UAE adopts the strangest of approaches: it simply ignores the detailed legal analysis and overwhelming evidence laid out in Qatar's Memorial. The UAE apparently takes that approach on the assumption that the Court must assess its jurisdiction only "against the content of Qatar's Application"[10]. As a matter of substance, the UAE's assumption is flatly wrong. The Court's general practice in assessing its jurisdiction is to "base[] itself on the application, *as well as the written and oral pleadings of the parties*"[11]. The UAE's confusion appears to result from its misunderstanding of the statement in *Croatia Genocide* that the Court is "in principle" to assess its jurisdiction "on the basis of the conditions that existed at the time of the institution of the proceedings"[12]. But that rule self-evidently does not fix the evidence or arguments on which the

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[10] UAE Preliminary Objections, p. 36, para. 62.

[11] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, para. 26 (emphasis added); *see also Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, 6 June 2018*, paras. 48–73; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, paras. 25–36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, paras. 131–143 (assessing Serbia's preliminary objections with respect to submissions made in Croatia's memorial); *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, paras. 47, 69; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, paras. 22–39.

[12] *See* UAE Preliminary Objections, p. 36, para. 62 (quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, paras. 79–80).

Court's assessment is based; rather, it identifies the point in time at which jurisdiction is generally to "be assessed"[13].

1.8 Thus, the UAE's repeated denials of its actions—for example, calling the fact that Qataris were collectively expelled and banned from entering the UAE "false" and "plainly untrue"[14]—ignore the record of evidence before the Court demonstrating the vast numbers of Qataris forced to flee the UAE as a result of the Discriminatory Measures[15]. Equally, when the UAE argues that its actions are just non-discriminatory immigration controls, it ignores, for example, its own contemporaneous actions and statements made at the time of imposing the Discriminatory Measures[16], which make clear the UAE's punitive and discriminatory purpose in taking those Measures. And when the UAE argues that the CERD does not encompass "nationality", it does not even attempt to address Qatar's showing of the discriminatory effect of its Measures on individuals of indisputable Qatari national origin[17], in the sense even the UAE admits is covered by the CERD.

1.9 As a matter of procedure, the UAE's approach distorts the natural sequence of argument and decision ensured by the Court's practice, the self-

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[13] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008,* paras. 79–80.

[14] UAE Preliminary Objections, p. 9, para. 18.

[15] *See* Qatar Memorial, Chap. V, Sec. I.B.2.

[16] *See* Qatar Memorial, p. 4, para. 1.8; *ibid.*, p. 9, para. 1.19; *ibid.*, pp. 22–24, paras. 2.11–2.12.

[17] *See* Qatar Memorial, Chap. III, Sec. I.B.2.c.

evident purpose of which is to afford the parties a full opportunity for an exchange on the merits of the preliminary objections that have been made and the Court a full basis on which to determine them[18].

1.10 Overall, the inevitable, and perhaps intended, result of the UAE's approach is that its written submission leaves entirely unaddressed substantial aspects of Qatar's case relevant to its Preliminary Objections. But the UAE cannot prevail on its Preliminary Objections by wishing away the law and evidence on the basis of which Qatar has established jurisdiction and admissibility. Although the UAE's submissions throughout this proceeding have tried mightily to suggest otherwise, this is a human rights case, and it is Qatar and the Qatari people, not the UAE, who have been the victims in this dispute and have suffered as a result of the UAE's discriminatory acts.

1.11 Finally, while the UAE does not challenge directly the Court's jurisdiction on these grounds, the UAE does attempt to deflect attention away from its unlawful actions by arguing that the "real dispute" between the Parties relates to Qatar's alleged support for terrorism[19]. Qatar has already responded to these false allegations in its Memorial[20], as well as during the first provisional measures

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[18] The very purpose of the preliminary objections phase is to brief the Court on all relevant questions of law and fact and uphold the applicant's right to respond, as provided for in the Rules of Court. *See, e.g.*, Rules of the International Court of Justice, Art. 79, paras. 5, 6 (providing applicant opportunity to present written and oral arguments and supporting evidence in response to preliminary objections).

[19] UAE Preliminary Objections, p. 32, para. 52.

[20] *See* Qatar Memorial, pp. 64–66, paras. 2.68–2.70.

phase[21]. Whatever the content of the broader political dispute between the Parties, it goes without saying that the mere existence of that dispute does not deprive the Court of its jurisdiction over claims clearly related to the interpretation or application of the CERD[22].

1.12 As a result, the UAE's allegations are irrelevant to the task at hand. In its Preliminary Objections, the UAE argues for the first time that its measures were "reasonable and proportionate measures" that were "adopted with the aim of inducing Qatar to comply with its obligations under international law"[23]. While it cannot bring itself to use the term, the UAE presumably means to argue by this language that its actions thus may be justified as countermeasures[24]. But countermeasures, even if otherwise lawful, may not violate fundamental human rights[25]. Indeed, the CERD itself expressly states that it allows no derogation, reflecting the general proposition that the fundamental protection against racial

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21 *See* CR 2018/12, pp. 16–17, paras. 6–7 (Al-Khulaifi); CR 2018/14, p. 44, para. 2 (Al-Khulaifi).

22 As the Court previously explained in its 2015 Judgment on Preliminary Objections in *Bolivia v. Chile*, "applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties". *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objections, Judgment, I.C.J. Reports 2015*, para. 32; *see also Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment,13 February 2019*, para. 36; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, para. 37.

23 UAE Preliminary Objections, p. 22, para. 34.

24 *See* UAE Preliminary Objections, pp. 19–22, paras. 30–34.

25 *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II (Part Two), Art. 50(1)(b) ("Countermeasures shall not affect: . . . (b) obligations for the protection of fundamental human rights").

discrimination is an obligation *erga omnes* and a *jus cogens* norm[26]. It is also well established that countermeasures require the invoking State to comply with numerous procedural requirements, none of which is met here[27]. In any event, any question as to whether the UAE's breaches of the CERD constitute lawful countermeasures would relate to the merits of the dispute and is inappropriate for resolution as preliminary objections.

1.13 In sum, contrary to the UAE's allegations, the dispute before the Court concerns violations of the CERD based on the UAE's discriminatory campaign against individuals of Qatari national origin. The dispute has therefore properly been brought to the Court in accordance with Article 22 of the CERD. Further, there is no barrier to the admissibility of Qatar's claims.

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[26] *See* Qatar Memorial, pp. 198–199, para. 4.28; *see also* IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/30 (17 September 2003), paras. 97–101; *ibid.*, paras. 110–111 (establishing the *jus cogens* character of the principles of equality and non-discrimination); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II (Part Two), Commentary on Art. 26(5) ("Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.").

[27] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II (Part Two), Arts. 51–52 (providing that countermeasures must be "commensurate with the injury suffered" (Art. 51); that before taking countermeasures, an injured state must call upon the responsible State to fulfill its obligations, notify the responsible State of its decision to take countermeasures and offer to negotiate (Art. 52); and that countermeasures must be suspended if the internationally wrongful act has ceased or the dispute is pending before a court with the authority to make decisions that are binding on the parties (Art. 52)).

1.14 Qatar thus requests that the Court reject the UAE's Preliminary Objections, declare that it has jurisdiction over the dispute and that Qatar's claims are admissible, and proceed to hear the claims on the merits.

Section II. Structure of Qatar's Written Statement

1.15 Qatar's Written Statement addressing the UAE's Preliminary Objections is comprised of five Chapters, followed by Qatar's Submissions.

1.16 **Chapter II** demonstrates that the UAE's first preliminary objection—that "the acts alleged by Qatar . . . do not fall within the scope of the Convention and the Court thus has no jurisdiction *ratione materiae* under Article 22 of the Convention"[28]—should be rejected for two independent reasons.

1.17 *First*, the UAE's argument that "national origin" excludes "nationality" is wrong: when analyzed according to the framework established by Article 31 of the Vienna Convention on the Law of Treaties ("***VCLT***"), the term "national origin" as used in the CERD must be understood to encompass nationality. In particular, while the terms "national origin" and "nationality" may not be synonymous, that does not mean that discrimination based on the ordinary meaning of "national origin" read in context does not encompass discrimination predicated on present "nationality". The UAE's interpretation seeking to exclude present nationality would have an extraordinarily limiting effect upon the CERD by excluding discrimination between certain groups of non-nationals, a category of conduct that the CERD Committee has called "one of the main sources of

[28] UAE Preliminary Objections, p. 7, para. 15(a).

contemporary racism"[29]. This far-reaching and unwarranted restriction on the CERD's scope stands as a direct contradiction of the CERD's object and purpose to eliminate all forms of racial discrimination. Qatar's interpretation is confirmed by the CERD's *travaux préparatoires*, which reveal that the drafters expressly declined to exclude nationality-based discrimination from the scope of the CERD prohibitions.

1.18 *Second*, the UAE's conduct violates the CERD because its Measures are discriminatory in both purpose and effect, by intentionally targeting and having a disproportionately negative impact on persons of Qatari "national origin" in the historical-cultural sense, irrespective of their present nationality[30]. The UAE's Preliminary Objections do not address Qatar's argument or evidence on this point, but accept that the term "national origin", *at a minimum*, refers to characteristics related to country of birth and parentage—characteristics which are possessed by precisely the population of Qataris impacted by the Measures. As such, even on the UAE's own case, the acts alleged by Qatar clearly are capable of falling within the scope *ratione materiae* of the CERD. To conclude otherwise would require the Court either to effectively read the term "national origin" out of the CERD, or deny the very existence of Qataris as a people possessing a unique national origin. Neither outcome can be sustained.

1.19 **Chapter III** addresses the UAE's second preliminary objection; namely, that the requirements in Article 22 of the CERD are cumulative, not alternative,

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[29] **Memorial Vol. IV, Annex 109**, CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens, Sixty-fifth Session* (2005), Preamble.

[30] Qatar Memorial, p. 87, para. 3.24; *ibid*., pp. 126–141, paras. 3.86–3.112.

and that Qatar has allegedly failed to satisfy both requirements. In place of a straightforward and common-sense reading of Article 22, the UAE posits that Article 22 requires a party to "pursue as far as possible *both* negotiation and the procedures expressly provided for in the CERD before referring a dispute to the Court"[31]. Imposing a cumulative reading of the Article 22 requirements is, however, at odds with not only the text, but also the principle of effectiveness, the object and purpose of the provision, and the protective purpose of the CERD and human rights treaties generally.

1.20 **Chapter IV** addresses the UAE's third and final preliminary objection, by which the UAE argues that Qatar's Application should be judged inadmissible because "[t]he initiation of parallel proceedings before the Court in respect of the same dispute whilst the Article 11 procedure was pending before the CERD Committee constitutes an abuse of process"[32]. It is inconceivable that Qatar's attempt to resolve its dispute pursuant to the peaceful dispute settlement provisions available to it under the CERD—and agreed to by the UAE—could be considered an abuse of process in the current circumstances. Further, as the Court will recall, the UAE has previously challenged the CERD Committee's competence, going so far as to ask the Court to order Qatar to terminate the CERD Committee proceedings under the guise of seeking provisional measures of protection—a gambit that proved unsuccessful[33]. This objection thus makes clear that the UAE seeks to prevent Qatar from bringing this dispute before *any* forum.

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[31] UAE Preliminary Objections, p. 76, para. 143 (emphasis added).

[32] UAE Preliminary Objections, p. 7, para. 15(c).

[33] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Order of 14 June 2019*, p. 9, paras. 27–28,

1.21 **Chapter V** explains, as Qatar did in its Memorial, that the Court's incidental jurisdiction renders it competent to adjudicate the UAE's compliance with the provisional measures order of 23 July 2018 (the "***Order***") separate from its jurisdiction to adjudicate Qatar's other claims under the CERD, and thus regardless of the Court's decision on the UAE's Preliminary Objections [34].

1.22 The Written Statement comprises Qatar's arguments and submissions (**Volume I**). Included with the Written Statement is one additional volume of Annexes, which include materials relied upon in the Written Statement. The annexed materials are arranged in the following order: (*i*) Qatari government documents (**Vol. II, Annex 1**); (*ii*) United Nations documents (**Vol. II, Annexes 2–8**); (*iii*) CERD Committee documents (**Vol. II, Annexes 9**–**10**); (*iv*) documents from international organizations (**Vol. II, Annexes 11**–**12**); (*v*) relevant excerpts from books, academic articles, and news articles (**Vol. II, Annexes 13–20**); and (*vi*) other documents (**Vol. II, Annexes 21, 272-A**).

30 (finding that the requested measure "do[es] not relate to the protection of plausible rights of the UAE under CERD pending the final decision in the case").

34 *See* Qatar Memorial, p. 345, para. 6.5.

CHAPTER II
THE COURT SHOULD REJECT THE UAE'S FIRST PRELIMINARY OBJECTION TO ITS JURISDICTION *RATIONE MATERIAE*

2.1 The UAE's first preliminary objection hangs entirely on two propositions. As a factual matter, the UAE denies outright that the collective expulsion and other acts of discrimination took place. To the extent the UAE acknowledges it took any action, it contends that its acts "have been directed against citizens of Qatar on the basis of their *nationality*" and "would not have been directed at any individuals on the basis of any particular *national or ethnic origin*"[35]. As a legal matter, the UAE claims that the CERD "does not apply to differentiation on the basis of *nationality*, which is a different concept from national . . . origin"[36]. According to the UAE, "[t]he acts alleged by Qatar therefore do not fall within the scope of the Convention"[37].

2.2 The UAE is wrong. *First*, the UAE's framing of the dispute in its Preliminary Objections fundamentally mischaracterizes the basis on which the Court will determine its jurisdiction. Specifically, the UAE's actions are not routine immigration restrictions directed at Qatari citizens as the UAE claims, but instead constitute wholesale discriminatory conduct in the form of collective expulsion and other measures that violate the fundamental human rights of Qatar and Qataris protected under the CERD[38]. Equally, the UAE is wrong when it

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35 UAE Preliminary Objections, p. 7, para. 15(a) (emphasis in original).

36 UAE Preliminary Objections, p. 7, para. 15(a) (emphasis in original).

37 UAE Preliminary Objections, p. 7, para. 15(a).

38 Qatar Memorial, pp. 235–236, paras. 5.1–5.4.

ignores Qatar's claims that its measures related to the suppression of expression and incitement of racial hatred are capable of violating the CERD—conduct that is not limited to "current nationality". While these matters largely comprise issues to be resolved on the merits, for present purposes it suffices to say that the UAE's framing of the dispute cannot strip the Court of its jurisdiction *ratione materiae*—it is for the Court to determine on an objective basis the subject matter of the dispute, paying attention to the pleadings of both parties, but in particular the framing of the applicant (***Section I***).

2.3 *Second*, for the reasons set out in the Memorial, each of the ordinary meaning, context, object and purpose, and supplementary materials demonstrate that the UAE is wrong when it argues that the CERD does not prohibit discrimination based on nationality[39]. Hence, the UAE's admission that certain of its Discriminatory Measures "have been directed against citizens of Qatar on the basis of their nationality"[40] alone suffices to establish the Court's jurisdiction *ratione materiae* (***Section II***).

2.4 *Finally* and more generally, the UAE's framing is at odds with the CERD itself. The CERD's protective scope is not confined to the stated purpose of a particular State act, which would allow a State to escape international liability by virtue of its own characterization of its conduct. Rather, the CERD prohibits racial discrimination in the *actual* purpose and effect[41]. As Qatar also demonstrated in

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39 *See* Qatar Memorial, Chap. III, Sec. I.B.1.

40 UAE Preliminary Objections, p. 7, para. 15(a) (emphasis omitted).

41 Qatar Memorial, pp. 78–82, paras. 3.6–3.14.

the Memorial[42], the Discriminatory Measures have a punitive discriminatory purpose, as well as a disparate impact on the rights of individuals of Qatari national origin in the historical-cultural sense—a conception of national origin that even on the UAE's own case, falls within the definition of "national origin" in Article 1(1). That is, *even* the UAE's inappropriately narrow definition of "national origin" affords protection from discrimination to individuals of Qatari origin based on their country of birth and parentage[43]. Hence, even if the Court were to accept the UAE's interpretation of "national origin," the discriminatory purpose and effect of the UAE's collective expulsion and accompanying measures would each independently suffice to locate Qatar's claims within the scope *ratione materiae* of the CERD and hence of the Court's jurisdiction (***Section III***).

Section I. The UAE Mischaracterizes Its Actions for Purposes of Its Preliminary Objections

2.5 It is well-established that "it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim", and that in so doing, "the Court examines the application as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant"[44]. Yet the UAE urges the Court to effectively

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[42] *See* Qatar Memorial, p. 4, para. 1.8; *ibid.*, p. 9, para. 1.19; *ibid.*, p. 125, para. 3.85; *ibid.*, pp. 137–141, paras. 3.107–3.112.

[43] Qatar Memorial, pp. 126–137, paras. 3.86–3.106. *See also* UAE Preliminary Objections, p. 42, para. 76, n. 139.

[44] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, 6 June 2018*, para. 48 (citing *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*,

ignore all of the above, and instead settle on a version of the "dispute" that bears no relationship to the record—one in which the UAE's acts relate only to "basic immigration control measures" that had no effect on the lives of thousands of Qataris, in which the collective expulsion of Qataris never occurred, and in which the UAE's persistent campaign of anti-Qatari propaganda and incitement of racial hatred simply does not exist. Again, the factual issues surrounding the UAE's substantive violations of the CERD are, of course, questions to be resolved on the merits and not during the preliminary objections phase. But for these purposes, the UAE's transparent attempt to artificially limit the dispute before the Court in order to support its first preliminary objection fails in light of the record. Rather, Qatar's submissions and evidence—which must be given "particular attention"—make clear that the "real issue in the case" and the objects of Qatar's claims are clearly "capable of falling within the provisions of" the CERD, and thus that the Court has jurisdiction to entertain them[45].

2.6 As Qatar explained in its Application, Memorial, and during the provisional measures phase of the proceedings, Qatar's claims are based on acts and omissions of the UAE that discriminate against Qataris on the basis of national origin and in violation of Articles 2, 4, 5, 6, and 7 of the CERD[46]. These acts and omissions include, in particular, the collective expulsion of Qataris from the UAE pursuant to its 5 June Directive (the "***Expulsion Order***"); the absolute

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para. 26 and *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, para. 38).

[45] *See Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, 6 June 2018*, paras. 48, 69.

[46] Qatar Memorial, p. 5, para. 1.10; Qatar Application, p. 41, para. 58; Qatar RPM, pp. 7–8, para. 12; CR 2018/12, p. 19, para. 5 (Donovan).

ban on entry to the UAE by Qataris (the "***Absolute Travel Ban***"), which was later modified by the imposition of a "hotline" and website procedure that continue to restrict Qataris' entry into the UAE on an arbitrary and discriminatory basis (the "***Modified Travel Ban***"); and the enactment of measures encouraging anti-Qatari hate propaganda and prejudice, and suppressing Qatari media and speech deemed to support Qatar (including, respectively, the "***Anti-Qatari Incitement Campaign***", the "***Anti-Sympathy Law***", and the "***Block on Qatari Media***")[47]. Qatar has submitted significant evidence in support of its claims, including most recently in its Memorial[48].

2.7 In its Preliminary Objections, the UAE echoes arguments it made during the first provisional measures phase of the proceedings to insist that "Qatar's claims that its citizens were 'collectively expelled' or prohibited from entering the UAE . . . are plainly untrue", and that "no expulsion and no ban on entry have been imposed," arguing that Qatar has put forth no evidence in support of its claims (while choosing to ignore the evidence and arguments submitted with Qatar's Memorial)[49]. On this basis, the UAE insists that "[t]he only measure the UAE has taken in relation to citizens of Qatar was to establish entry requirements to enter the UAE" [50].

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47 Qatar Memorial, pp. 2–4, paras. 1.3–1.8 (defining terms and describing the UAE's Discriminatory Measures).

48 *See generally* Qatar Memorial, pp. 14–16, paras. 1.35–1.38.

49 *See* UAE Preliminary Objections, p. 9, para. 18; *ibid.*, p. 24, para. 36. *See also* CR 2018/13, pp. 12–13, paras. 11–13 (Alnowais); CR 2018/13, pp. 63–64, paras. 25–30 (Shaw).

50 UAE Preliminary Objections, pp. 23–24, para. 36.

2.8 Of course, the Court need not definitively decide these issues in order to determine that the acts complained of by Qatar are capable of falling within the scope *ratione materiae* of the CERD, and the UAE is free to reserve its full defense on the merits to the merits phase of the proceedings[51]. However, for purposes of assessing its Preliminary Objections, the UAE's attempts to minimize its conduct go hand in hand with its attempts to narrow the dispute before the Court to one solely relating to "present nationality" in order to argue that the Court is divested of jurisdiction *ratione materiae*.

2.9 Specifically, the UAE's central contention in its Preliminary Objections that the totality of its actions must be reduced to mere "entry requirements" that can be characterized as "basic immigration control measure[s] used by virtually every state"[52] fundamentally misstates the dispute before the Court. While individual deportations of non-nationals may be common, expulsion of an entire group of non-nationals of a particular nationality on a collective basis is categorically prohibited as unlawful discrimination[53].

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[51] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 852, para. 51 ("In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits.").

[52] UAE Preliminary Objections, p. 29, para. 47.

[53] Qatar Memorial, p. 271, para. 5.67. In this respect, the UAE also attempts to argue that no collective expulsion occurred because "the UAE did not . . . then issue any deportation or expulsion order or institute a travel ban." UAE Preliminary Objections, p. 20, para. 32. However, as demonstrated in Qatar's Memorial, the UAE's formalistic arguments are not only irrelevant to the question of its responsibility, they are also contradicted by the factual record, including the UAE's contemporaneous treatment of the Expulsion Order as mandatory and binding, its representations to other international bodies of its mandatory

2.10 While a visa requirement may be common, a total ban on entry against one country's population, or a total ban modified to allow entry by a narrow subset of that population, is not[54]. Nor is it "basic" or "common" practice to enact so-called "entry requirements" against one group without notice, publication or any semblance of due process, leaving individuals from that group subject to the whims of individual government officials and unable to determine whether entry is possible and if so, under what conditions[55].

2.11 Further, the UAE's discriminatory aim in enacting these policies, and the UAE's explicit and acknowledged animus against Qatar and the explicit punitive purpose with which they were implemented, remove them from the territory of ordinary restrictions, and identify them as conduct clearly falling within the CERD's definition of discrimination[56]. These are the respects in which the UAE's

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nature, and the impact on Qataris and Emiratis. Qatar Memorial, p. 26, para. 2.17; *ibid.*, p. 247, para. 5.22; *ibid.*, p. 249, para. 5.26; *ibid.*, p. 250, para. 5.28; *ibid.*, pp. 252–253, paras. 5.31–5.32. Particularly striking is the evidence of the Qataris forced to leave by the Expulsion Order (including entry and exit records demonstrating a 98% decline in the number of Qataris entering the UAE after the 5 June Directive) and Qataris whose fundamental rights have been compromised by the Absolute and Modified Travel Bans. *Ibid.*, pp. 88–93, paras. 5.25–5.32.

[54] Qatar Memorial, p. 106, para. 3.55.

[55] Qatar Memorial, pp. 105–106, paras. 3.53–3.55.

[56] Qatar Memorial, p. 9, para. 1.19; *ibid*., pp. 64–66, paras. 2.68–2.70; CR 2018/13, p. 12, para. 8 (Alnowais); *see* **Memorial Vol. III, Annex 92**, CERD, Art. 1(1) (defining discrimination to include distinctions which have the "purpose" of nullifying or impairing the enjoyment of human rights on an equal footing); *see also* Qatar Memorial, pp. 274–288, paras. 5.72–5.93 (explaining that distinctions must have a "legitimate aim" in order to be lawful under the CERD); **Memorial Vol. IV, Annex 109**, CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens*, Sixty-fifth Session (2005), p. 2, para. 4 (same); **Memorial Vol. IV, Annex 112**, CERD Committee, *General Recommendation No. 32 on the Meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, document CERD/C/GC/32 (24 September 2009), p. 8, para. 32 (same).

Discriminatory Measures are plainly capable of falling within the scope of the CERD, and this is the basis on which the Court must assess its jurisdiction *ratione materiae*.

2.12 The UAE's attempt to reduce the totality of its actions to "basic immigration control" measures also ignores Qatar's claims that, by enacting the Anti-Sympathy Law and the Block on Qatari Media, the UAE has interfered with Qataris' freedom of opinion and expression in violation of Articles 2(1), 5(d)(viii) and 6 of the CERD, as well as its claims that, by engaging in its ongoing, virulent, and widespread Anti-Qatari Incitement Campaign, the UAE has violated Articles 2, 4, 6 and 7 of the CERD[57]. These Discriminatory Measures are entirely divorced from any so-called "immigration controls" and on their face are unrelated to nationality or citizenship.

2.13 The UAE attempts to avoid Qatar's evidence relating to the Anti-Sympathy Law and Block on Qatari Media[58] by stating only that these actions "cannot be characterized as discriminatory" because they apply to or affect all individuals within the UAE[59]. Yet this conclusory statement fails to address not

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[57] *See* Qatar Memorial, pp. 317–342, paras. 5.142–5.182.

[58] *See* Qatar Memorial, pp. 43–45, paras. 2.39–2.41; *ibid.*, pp. 48–58, paras. 2.45–2.61.

[59] UAE Preliminary Objections, pp. 73–74, paras. 136–137. In its Preliminary Objections, the UAE argues that the Block on Qatari Media "cannot be racial discrimination within the meaning of the CERD, as the effects of the blocking of transmissions are felt by all individuals within the UAE". *Ibid.*, p. 74, para. 136. *But see* **Memorial Vol. IV, Annex 108**, CERD Committee, *General Recommendation No. 20 on Article 5 of the Convention*, document CERD/C/GC/20 (1996), para. 2 ("Whenever a State imposes a restriction upon one of the rights listed in Article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with Article 1 of the Convention as an integral part of international human rights standards."). It also denies (again) that its Anti-Sympathy law applies to expressions of

only the fact that the measures do target at least one national origin, but also the discriminatory effects noted by Qatar in its Memorial and the role these Measures have played in fostering the atmosphere of racial hostility against Qataris[60], conduct that unequivocally brings the UAE's actions within the ambit of the CERD. At the same time, the UAE has simply ignored Qatar's claims arising from the Anti-Qatari Incitement Campaign, failing entirely to address the substantial evidence demonstrating its perpetuation and encouragement of that Campaign[61]. In so doing, it disregards one of the CERD's core obligations: to prevent the dissemination of ideas based on racial hatred and the incitement to racial discrimination[62].

2.14 Properly characterized, the dispute before the Court thus clearly falls within its jurisdiction *ratione materiae*, and the UAE's complete disregard of these claims unmasks its attempt to mischaracterize Qatar's claims. In short, the UAE cannot rewrite the record before the Court in an attempt to avoid the Court's jurisdiction.

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sympathy for Qataris, in addition to expressions of sympathy for Qatar. *Ibid.*, p. 74, para. 137.

[60] As explained in Qatar's Memorial, the UAE's arguments on these points cannot be reconciled with the factual record. *See* Qatar Memorial, p. 334, para. 5.170. In any case, the question of whether the UAE's acts have violated substantive rights enumerated in the CERD, including the right to freedom of opinion and expression, is a matter for the merits. The UAE also questions in this context whether corporations can be rights holders under the CERD, but appears to make no specific objection on this basis. For the avoidance of doubt, Qatar refutes the UAE's position. *See* Qatar Memorial, p. 320, para. 5.150.

[61] *See* UAE Preliminary Objections, pp. 73–74, paras. 135–137.

[62] *See* Qatar Memorial, pp. 323–329, paras. 5.154–5.163.

Section II. The UAE Is Wrong When It Argues That the CERD Permits Discrimination on the Basis of Nationality

2.15 As explained in Qatar's Application and Memorial, the CERD has an overarching and far-reaching goal: to eliminate racial discrimination in purpose and effect "*in all its forms*"[63]. It rejects and outlaws the practice of targeting entire groups of people not because of their individual actions, but because of certain shared characteristics that make them the object of punishment and discriminatory treatment. In line with this goal, the definition of "racial discrimination" in Article 1(1) of the CERD includes a comprehensive set of protected characteristics, which extends beyond the concept of "race" alone to include, among others, national origin.

2.16 Notwithstanding the broad definition provided in Article 1(1), the UAE begins its First Preliminary Objection with the statement that "[t]he CERD is not concerned with discrimination in general, but with *racial* discrimination"[64], and proceeds to ignore the CERD's actual definition of "racial" discrimination, which incorporates multiple forms of identity and characteristics. It instead attempts to tie it to a narrow conception of "race" and "ethnicity". In particular, the UAE argues that the CERD's object and purpose is most accurately reflected in the Preamble's call to address "discrimination between human beings on the grounds of *race, colour or ethnic origin*"[65], as well as its condemnation of the "existence

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63 **Memorial Vol. III, Annex 92**, CERD, Preamble, para. 10.

64 UAE Preliminary Objections, p. 33, para. 53 (emphasis in original).

65 CR 2018/13, p. 43, para. 40(b) (Olleson) (emphasis in original).

of *racial* barriers"[66], and "governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation"[67], while ignoring the rest of the Preamble.

2.17 The UAE also seeks to contrast Qatar's claims of discrimination on the basis of national origin with previous cases brought before the Court under the CERD, which, in the UAE's words, concerned "allegations . . . of ethnic cleansing, or prejudicial differences of treatment of minority groups based on ethnicity."[68] But the UAE can defend its narrow concept of "race" only by selectively referring to preambular language in isolation, without considering the CERD as a whole, much less its object and purpose and the fundamental character of the norms it seeks to protect. Contrary to the UAE's position, the discrimination condemned by the Convention is not limited to "race"-based discrimination in the narrow sense argued by the UAE[69].

2.18 As explained in Qatar's Memorial[70], the plain text of the CERD interpreted in accordance with the VCLT indicates that its prohibition of discrimination based on "national origin" includes nationality-based discrimination (***Section II.A***). This interpretation is further confirmed by the

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66 CR 2018/13, p. 43, para. 40(c) (Olleson) (emphasis in original).

67 CR 2018/13, p. 43, para. 40(d) (Olleson).

68 CR 2018/13, p. 39, para. 20 (Olleson).

69 *See, e.g.*, **Vol. II, Annex 10**, CERD Committee, *General Recommendation No. 29 on article 1, paragraph 1, of the Convention (Descent)*, *Sixty-first Session* (2002), Art. 4 (condemning dissemination of ideas of caste superiority).

70 *See* Qatar Memorial, pp. 89–115, paras. 3.28–3.68.

CERD's *travaux préparatoires* and the circumstances of its conclusion, properly understood (***Section II.B***).

A. The Ordinary Meaning of "National Origin", Read in Context and in Light of the CERD's Object and Purpose, Encompasses Nationality

2.19 The parties agree that the starting point for interpretation is Article 31(1) of the VCLT, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[71] However, the UAE's argument that "[r]eading the CERD in light of [the VCLT] rules, the CERD cannot apply to . . . different treatment on the basis of current nationality"[72] is wrong. Rather, as demonstrated in Qatar's Memorial, the ordinary meaning of "national origin", read in context and in light of the CERD's object and purpose, encompasses "present nationality"[73].

2.20 While Qatar will not reiterate that analysis in full here, the following subsections demonstrate that the UAE's arguments in its Preliminary Objections relating to the ordinary meaning of "national origin" (***Part 1***), the context of the term in Article 1 (***Part 2***), and the CERD's object and purpose (***Part 3***), are each unavailing. Rather, each of these arguments in fact confirms that Qatar's interpretation is the *only* one compatible with the intent of the drafters. Qatar will also demonstrate that, contrary to the UAE's claims, interpreting "national origin"

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71 Vienna Convention on the Law of Treaties, 1155 United Nations, *Treaty Series* 331 (23 May 1969), Art. 31(1) (hereinafter "VCLT").

72 UAE Preliminary Objections, p. 39, para. 70.

73 *See* Qatar Memorial, pp. 88–115, paras. 3.26–3.68.

to encompass "present nationality" is fully consistent with the subsequent practice of States Parties to the CERD (***Part 4***).

1. The Ordinary Meaning of "National Origin" Encompasses Current Nationality

2.21 The UAE starts with the wrong question: it is not whether national origin and nationality "equate"[74]; but rather whether nationality is encompassed within the definition of national origin such that discrimination on the basis of nationality engages the protections under the CERD. Further, the UAE's argument that the ordinary meaning of "national origin" "cannot be equated to nationality" because "'national origin' denotes an association with a nation of people, not a State"[75] is contradicted by the very sources upon which it relies. In fact, the dictionary definitions cited by the UAE—like those Qatar quotes in its Memorial—demonstrate that the ordinary meaning of "national origin" encompasses nationality, present or otherwise, and is directly tied to the concept of belonging to a particular State.

2.22 Although the UAE elides this point, the fact that "national" is connected to the concept of a "nation"—which itself correlates with the concept of a State—is readily apparent, including in the dictionary cited by the UAE, which defines "national" as "belonging to a particular nation," or "concerning or covering the whole nation."[76]

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[74] *See* UAE Preliminary Objections, p. 39, para. 72.

[75] UAE Preliminary Objections, pp. 41–42, para. 76.

[76] *See* **Vol. II, Annex 21**, Chambers Dictionary, Definition of "national", https://chambers.co.uk; UAE Preliminary Objections, p. 41, para. 75, n. 133 (citing Chambers Dictionary definition of "nation"); *see also* Qatar Memorial, pp. 90–93, paras. 3.30–3.31

2.23 Moreover, the dictionary definitions of "origin" and "nation" that the UAE argues supposedly foreclose the possibility that "national origin" encompasses nationality in fact *explicitly* refer to an individual's connection to a State. For example, the Chambers Dictionary defines "nation" as referring *both* to "the people living in, belonging to, and together forming, a single *state*," and to "a race of people of common descent, history, language or culture, etc., but *not necessarily* bound by defined territorial limits of a state."[77] Likewise, the definitions of "origin" cited by the UAE, for example, include "the country from which [a] person comes"[78], and do not exclude a person's current associations with a given State. It is telling that in this critical respect, the UAE states only that ""[w]hen taken with 'origin, the second sense of 'nation' is the most appropriate,"[79] without any explanation for why this should be so given that both "senses" are encompassed in the very definition to which the UAE cites.

2.24 The Chinese, French, Russian and Spanish definitions of "national" and "origin" support the same conclusion, given that—as the UAE notes—they define "origin" and "national" similarly to the English definition[80]. Notably, the Chinese

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("The Oxford and the Cambridge Dictionaries define 'national' as '[r]elating to or characteristic of a nation' and 'relating to or typical of a whole country and its people'. 'Nation,' in turn, is defined by the Oxford and Cambridge Dictionaries, respectively, as 'a large body of people united by common descent, history, culture, or language, inhabiting a particular state or territory,' and a 'country, especially when thought of as a large group of people living in one area with their own government, language, and traditions.'").

77 UAE Preliminary Objections, p. 41, para 75.

78 UAE Preliminary Objections, p. 40, para. 74.

79 UAE Preliminary Objections, p. 41, para 75.

80 UAE Preliminary Objections, pp. 40–41, paras. 74–75.

term cited by the UAE, "民族", does not reflect the authoritative Chinese text, which instead uses the term "原属国"[81]. As explained in Qatar's Memorial, this phrase, taken together, translates to "country of origin", not "ethnic group" as the UAE suggests[82]. Accordingly, the definitions cited by the UAE, like the definitions cited in Qatar's Memorial, are inclusive, not exclusive, of connections to a State—whether current or previous—and the UAE cannot support its unnecessarily restrictive interpretation excluding nationality on this basis.

2.25 For the same reason, the UAE's argument that "[a]n individual can acquire a nationality from a State or he can lose it . . . But one's national origin is immutable and inherent to the individual"[83] does not support its position. The UAE has no textual basis for stating that the ordinary meaning of "national origin" refers *only* to immutable characteristics *to the exclusion* of nationality in the legal sense of citizenship. Such a conclusion is not supported by any dictionary definition cited by the UAE.

2.26 In addition, other relevant uses of "national origin" demonstrate that, to the contrary, "national origin" encompasses *both* an individual's belonging to a nation in a historical sense, *e.g.*, in the sense of birth and ancestry, *and* present nationality[84]. For example, as elaborated in Qatar's Memorial, the European Court

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81 *Compare* UAE Preliminary Objections, p. 41, para. 75, n. 135 *with* United Nations General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 660 United Nations, *Treaty Series* 195 (21 December 1965).

82 *See* Qatar Memorial, p. 92, para. 3.31.

83 UAE Preliminary Objections, p. 42, para. 76; *ibid.*, p. 42, para. 76, n. 138.

84 *See* Qatar Memorial, p. 127, para. 3.90.

of Human Rights ("***ECtHR***") has consistently held that discrimination on the basis of an individual's nationality may constitute a violation of the prohibition on discrimination on the basis of "national . . . origin" found in Article 14 of the European Convention on Human Rights ("***ECHR***")[85]. In *Bah v. United Kingdom*, the ECtHR made clear that "nationality" is encompassed by the inclusion of the term "national origin" in Article 14; it assessed whether the applicant's claim of differential treatment, brought on behalf of her minor son, was based "on the nationality of her son, which equates to 'national origin' for the purposes of Article 14"[86].

2.27 In addition to the jurisprudence of the ECtHR, the work of the Council of Europe has made clear not only that nationality-based discrimination is contrary to European human rights law, but also that the term "national origin" is generally understood as inclusive of present nationality. For example, in interpreting Article 2 of the Additional Protocol to the Convention on Cybercrime, which criminalizes racist and xenophobic material that "advocates, promotes or incites hatred, discrimination or violence" against individuals on the basis of "national

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85 *See* Qatar Memorial, pp. 93–94, paras. 3.32–3.33; ECtHR, *Dhahbi v. Italy*, Application No. 17120/09, Judgment (Second Section) (8 April 2014), para. 50 (citing ECtHR, *Niedzwiecki v. Germany*, Application No. 58453/00, Judgment (25 October 2005); ECtHR, *Okpisz v. Germany*, Application No. 59140/00, Judgment (25 October 2005); ECtHR, *Weller v. Hungary*, Application No. 44399/05, Judgment (31 March 2009); ECtHR, *Fawsie v. Greece*, Application No. 40080/07, Judgment (28 October 2010); ECtHR, *Saidoun v. Greece*, Application No. 40083/07, Judgment (28 October 2010)).

86 *See* Qatar Memorial, p. 94, para. 3.33 (quoting *Bah v. United Kingdom*, Application No. 56328/07, Judgment (Fourth Section) (27 September 2011), para. 43).

origin"[87], among others, the Council has noted that "the notion of national origin" in Article 2:

> "is to be understood in a broad factual sense. It may refer to individuals' histories, not only with regard to the nationality or origin of their ancestors *but also to their own national belonging, irrespective of whether from a legal point of view they still possess it*. When persons possess more than one nationality or are stateless, the broad interpretation of this notion intends to protect them if they are discriminated on any of these grounds."[88]

2.28 Likewise, the Inter-American Court of Human Rights ("***IACtHR***") found violations of the American Convention on Human Rights ("***ACHR***"), which prohibits discrimination on the basis of "national . . . origin"[89], where a number of

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87 Council of Europe, *Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, European Treaty Series No. 189 (28 January 2003), Art. 2(1), ("'*[R]acist and xenophobic material*' means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.").

88 Council of Europe, *Explanatory Report, to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, European Treaty Series No. 189 (28 January 2003), p. 4, para. 20 (emphasis added). The Explanatory Report references both Article 1(1) of the CERD and Article 14 of the ECHR, and explains that "the grounds contained in Article 2 of the Protocol are…to be interpreted within their meaning in established national and international law and practice." *See ibid.*, p. 4, para. 18.

89 ACHR, Art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, *national* or social *origin*, economic status, birth, or any other social condition.") (emphasis added).

Haitian nationals were expelled from the Dominican Republic[90]. The African Commission on Human and Peoples' Rights ("***ACmHPR***") similarly found a violation of Article 2 of the African Charter on Human and Peoples' Rights ("***ACHPR***")—which prohibits discrimination on the basis of "national or social origin"[91]—based on the targeting and expulsion of 13 Gambian nationals by the government of Angola[92].

2.29 Thus, contrary to what the UAE argues, the ordinary meaning of "national origin" does not foreclose a past or present connection to a particular State (in addition to a people), nor is its definition restricted to immutable characteristics. Rather, the definition of "national origin" derived from its ordinary meaning supports the conclusion, as discussed below, that the term encompasses nationality when taken in context and in accordance with the CERD's object and purpose.

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90 IACtHR, *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment (August 28, 2014), para. 380; *see also ibid*., para. 394, n. 447 (noting that a number of the presumed victims were "of Haitian nationality").

91 ACHPR, Art. 2 ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, *national* and social *origin*, fortune, birth or any status.") (emphasis added).

92 ACmHPR, *Communication 292/04, Institute for Human Rights and Development in Africa / Angola* (22 May 2008), para. 79 ("'[A] state's right to expel individuals is not absolute and it is subject to certain restraints,' one of those restraints being a bar against discrimination based on national origin.").

2. The Context of "National Origin" in Article 1(1) Confirms That "National Origin" Encompasses Current Nationality

2.30 The UAE makes four principal arguments relating to the context of Article 1(1) of the CERD, none of which detracts from the conclusion that "national origin" encompasses nationality.

2.31 *First*, the UAE argues that "national origin" must be interpreted in light of "the link with the concept of ethnic origin", and the fact that the other terms enumerated in Article 1 allegedly refer to "immutable characteristics", and that therefore "national origin" cannot include nationality because "nationality . . . is not an inherent quality but a legal bond that can change over time."[93] As an initial matter, the UAE's apparent assumption that legal nationality is universally fluid in this sense is at odds with restrictive citizenship regimes, including in the Gulf region, that depend on immutable characteristics, such as birthplace and heritage[94]. So the UAE's notion that legal nationality cannot be akin to immutability in certain circumstances is just misconceived.

2.32 In any event, the UAE's attempt to equate "national origin" with "ethnic origin" unreasonably deprives the term "national origin" of independent meaning, ignoring the use in Article 1(1) of the term "ethnic *or* national origin" in the

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93 UAE Preliminary Objections, p. 43, para. 78.

94 *See* para. 2.128 below (discussing Qatari and Emirati nationality law). The UAE also disregards the fact that nationality in the legal sense nevertheless relates to a genuine connection between the individual and the State, often arising from the very social ties that the UAE considers relevant to "national origin." *See Nottebohm Case (second phase), Judgment, I.C.J. Reports 1955*, p. 23 ("[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.").

disjunctive. This disjunction is particularly clear in the Chinese version of the text, which says ". . . *or* country of origin *or* ethnic origin"[95]. As demonstrated in Qatar's Memorial, the meaning of the distinct concept of "national origin", taken in its proper context, covers a population that is not already covered by the other terms in Article 1(1), even as it complements those terms to ensure there are no lacunae in the scope of the CERD's coverage[96]. To read Article 1(1) otherwise thus would render the term 'national origin' superfluous, contrary to basic interpretative principles.

2.33 *Second*, the UAE argues that, if the drafters had intended "national origin" to mean "nationality", they would have used that term instead, as they did in Article 1(3)[97]. The fact that they did not, the UAE argues, "confirms a deliberate choice" by the drafters of the CERD to exclude nationality from the scope of Article 1(1)[98].

2.34 This argument gets the UAE nowhere. As is borne out by the *travaux*, discussed below[99], that the drafters may have considered the terms "nationality" and "national origin" to have different meanings does not mean that nationality is

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95 CERD, Art. 1(1) ("或原属国或民族") (emphasis added).

96 Qatar Memorial, p. 96, para. 3.37; *ibid.*, pp. 113–115, paras. 3.67–3.68.

97 *See* **Memorial Vol. III, Annex 92**, CERD, Art. 1(3) ("Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.").

98 UAE Preliminary Objections, p. 43, para 79.

99 *See* paras. 2.90–2.100 below (discussing the decision of the drafters to make "national origin" inclusive of nationality).

not encompassed within national origin. The drafters could equally have made the "deliberate choice" to include the broader term "national origin" in Article 1(1) but the narrower subset of "nationality" in Article 1(3)[100].

2.35 For the same reason, the fact that the other authentic texts of the CERD also use different terms for "national origin" and "nationality" in Articles 1(1) and 1(3)[101] is equally unavailing. As the *travaux préparatoires* confirm, this was precisely what happened: the terms "nationality" and "national origin" were often used interchangeably by the CERD's drafters, and both terms were at various points understood to refer to a range of characteristics that included, but were not limited to, present nationality[102].

2.36 *Third*, the UAE argues that the "immediate context" of Articles 1(2) and 1(3) supports its interpretation, because Article 1(2) "in fact permits differential treatment on the basis of nationality" and Article 1(3) "expressly uses the word 'nationality'"[103]. Yet again, this ignores the fundamental dichotomy between

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100 *See, e.g.*, **Memorial Vol. VI, Annex 150**, P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 144 ("With regard to 1(3), the term nationality is used twice. . . raising the question as to whether the term is being used in the same sense in both cases. If the first use may be regarded as clear in referring to legal citizenship and related matters, the second is less so, bearing in mind the ambiguity of 'national' and 'nationality', and the fact that the Convention addresses various grounds of discrimination, one of which is 'national origin'").

101 *See* UAE Preliminary Objections, p. 44, para. 81. As discussed in Qatar's Memorial and above, the terms "origine nationale", "origen nacional", "原属国" (yuán shǔguó), and "национального происхождения" (natzionalnoye proiskhozhdeniye) are inclusive of present nationality status and thus encompass the terms used in Article 1(3). *See* Qatar Memorial, pp. 91–93, para. 3.31; *see also* para. 2.24, above.

102 Qatar Memorial, pp. 119-120, para. 3.74; *see* Chap. II, Sec. II.B, below.

103 UAE Preliminary Objections, pp. 43–44, para. 80.

legitimate differential treatment and unlawful discrimination, as reflected in the treaty text and the CERD Committee's consistent interpretations of Article 1[104].

2.37 To begin with, contrary to the UAE's argument, Article 1(2), which excepts from the scope of the CERD "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens"[105], does not broadly permit differential treatment on the basis of nationality or between different groups of non-nationals. Rather, it sets a basic premise that the CERD does not prevent States from making certain distinctions between their *own* citizens and non-citizens. This is the consistent interpretation of the CERD Committee, repeatedly set forth and accepted without question by States parties[106].

2.38 As Qatar explained in its Memorial, the relationship between the first three paragraphs of Article 1 makes this clear[107]. Those paragraphs, in full, provide as follows:

> "(1) In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

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104 Qatar Memorial, pp. 100–105, paras. 3.45–3.53.

105 **Memorial Vol. III, Annex 92**, CERD, Art. 1(2).

106 Qatar Memorial, pp. 99–105, paras. 3.44–3.53 (citing CERD Committee decisions and reports of States parties).

107 Qatar Memorial, pp. 96–101, paras. 3.36–3.47.

> footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> (2) This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
>
> (3) Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."[108]

2.39 Article 1(1) thus first provides the operative definition of "racial discrimination", which includes discrimination based on "national . . . origin". Article 1(2) then excludes from that definition differences of treatment between citizens and non-citizens. This exception ensures that States may make legitimate distinctions between their own citizens and non-citizens, for example, in the area of political rights or offices of state confined to citizens.

2.40 The inclusion of Article 1(2) suggests two points: first, that non-citizens generally fall under the protection of Article 1(1), and second, that Article 1(1) prohibits nationality-based discrimination. If Article 1(1) did not include nationality-based discrimination, Article 1(2) would be superfluous: none of the other grounds of discrimination in Article 1(1) implicate the treatment of non-

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[108] **Memorial Vol. III, Annex 92**, CERD, Arts. 1(1)–1(3).

citizens or non-nationals *as such*. And indeed, as discussed below, the *travaux* confirm that this is exactly how Article 1(2) came about[109].

2.41 Article 1(3) further clarifies that the non-discrimination provision in Article 1(1) does not prohibit a State from deciding how individuals—necessarily non-citizens—acquire or lose the State's nationality and become its citizens. As such, while Article 1(2) addresses distinctions *between* citizens and non-citizens, Article 1(3) addresses treatment directed only at non-citizens. It clarifies that, while the CERD will not affect a State's sovereign rights to regulate issues related to nationality, naturalization and citizenship, such rights are not without limitation: a State cannot discriminate "against any particular nationality" in doing so.

2.42 As discussed in Qatar's Memorial, the opening text of Article 1(3)—"[n]othing in this Convention may be interpreted as"—clearly demonstrates that this clause is a preservation clause rather than a clause creating additional self-standing rights and obligations[110]. As such, in order for discrimination "against any particular nationality" to be prohibited under Article 1(3), it must already be prohibited elsewhere in the CERD—namely, in Article 1(1)[111].

2.43 This is precisely how the CERD Committee repeatedly has interpreted the relationship between these Articles, and in doing so, it has stressed that the exclusion in Article 1(2) "must be construed so as to avoid undermining the basic

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109 *See* Sec. II.B.1, below; *see also* Qatar Memorial, pp. 120–123, paras. 3.78–3.81.

110 Qatar Memorial, p. 98, para. 3.42.

111 Qatar Memorial, pp. 97–98, paras. 3.40–3.42.

prohibition of discrimination"[112]. As the body established "specifically to supervise the application of" the CERD, the CERD Committee's interpretation is entitled to "great weight"[113].

2.44 *Finally*, the UAE argues that because States must "guarantee the right of everyone, without distinction as to . . . national . . . origin, to equality before the law, notably in the enjoyment of"[114] the rights enumerated in Article 5 of the CERD, interpreting "national origin" as inclusive of present nationality would mean that "a State that conferred on citizens of certain States the right to vote or the right to be a public servant would be obliged to confer such rights on citizens of *all* States"[115]. It further argues that other rights protected under Article 5, like "the right to own property" and "the right to work", "confirm that 'national origin'

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112 **Memorial Vol. IV, Annex 109**, CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens, Sixty-fifth Session* (2005), p. 1, para. 2; *see also* **Memorial Vol. IV, Annex 104**, CERD Committee, *General Recommendation No. 11 on non-citizens*, document A/48/18 (1993), para. 1 ("Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination. Article 1, paragraph 2, excepts from this definition actions by a State party which differentiate between citizens and non-citizens. Article 1, paragraph 3, qualifies article 1, paragraph 2, by declaring that, among non-citizens, States parties may not discriminate against any particular nationality."); **Memorial Vol. IV, Annex 109**, CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens, Sixty-fifth Session* (2005), para. 1 ("Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2 provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality."); Qatar Memorial, p. 100, para. 3.45.

113 *See Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Judgment, 30 November 2010, I.C.J. Reports 2010*, para. 66; *see* Qatar Memorial, p. 99, para. 3.44.

114 *See* **Memorial Vol. III, Annex 92**, CERD, Art. 5.

115 UAE Preliminary Objections, p. 45, para. 82.

cannot mean nationality" because States parties to the CERD "customarily differentiate between citizens and non-citizens" with respect to these rights[116].

2.45 Neither of these conclusions follows from the plain text of Article 5, read in conjunction with Article 1. As explained above and in Qatar's Memorial, not every "distinction" amounts to unlawful discrimination[117]. Rather, the concepts of legitimacy and proportionality are inherent in the text and structure of Article 1, including Article 1(1)'s definition of racial discrimination and Article 1(4)'s exemption of special measures[118].

2.46 Thus, as the CERD Committee has observed, "differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate *or* fall within the scope of article 1, paragraph 4, of the Convention"[119]. This means that when States choose to grant certain privileges to a particular non-citizen group, they are not required to grant the same privileges to *all* non-citizen groups; in other words, so long as the distinction between groups is legitimate and proportional, it does not constitute unlawful *discrimination*. This would likely be the case where, for

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116 UAE Preliminary Objections, p. 45, para. 83.

117 *See* Qatar Memorial, pp. 82–85, paras. 3.15–3.20; *see also* paras. 2.37–2.39, above.

118 Qatar Memorial, p. 82, para. 3.15.

119 **Memorial Vol. IV, Annex 105**, CERD Committee, *General Recommendation No. 14 on article 1, paragraph 1, of the Convention*, document A/48/18 (1993), para. 2 (emphasis added). Article 1(4) of the CERD addresses "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". **Memorial Vol. III, Annex 92**, CERD, Art. 1(4).

example, a State reciprocally grants some of the rights and benefits normally associated with citizenship to nationals of certain other States based on a regional integration agreement, since such benefits are granted in pursuit of the legitimate aim of regional integration and friendly relations and are generally proportionate to that aim[120].

2.47 Indeed, as discussed in Qatar's Memorial, the CERD Committee, in General Recommendation No. 30, articulates this very approach, stating that:

> "[u]nder the Convention, differential treatment based on citizenship . . . will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[121]

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[120] *See, e.g.*, CERD Committee, *Reports submitted by States parties under article 9 of the Convention: Liechtenstein*, CERD/C/LIE/4-6 (14 February 2012), p. 4, para. 9 ("[T]he law governing foreigners in Liechtenstein distinguishes three groups of foreigners: 1) Swiss citizens, 2) citizens of member States of the European Economic Area (EEA), and 3) citizens of all other countries . . . . This distinction arises from the international treaties concluded with Switzerland and the States of the European Economic Area, which contain reciprocal rules governing the treatment of citizens"); CERD Committee, *Concluding observations on the fourth to sixth periodic reports of Liechtenstein*, CERD/C/LIE/CO/4-6 (23 October 2012), p. 3, para. 12 (noting that "persons from 'third countries', who are not citizens of Switzerland or countries from the European Economic Area, have to sign an integration agreement" and recommending that "the State party ensure that foreigners from 'third countries', who are to sign the integration agreement, are informed about it in advance and are protected against racial discrimination during the fulfilment of its terms").

[121] **Memorial Vol. IV, Annex 109**, CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens, Sixty-fifth Session* (2005), p. 2, para. 4; *see also* UAE Preliminary Objections, p. 71, para. 131.

2.48 The UAE attempts to avoid General Recommendation No. 30 as irrelevant by arguing that the Committee's "aim was obviously to make clear that differential treatment on the basis of citizenship or immigration status is prohibited insofar as, 'judged in light of the objectives and purpose of the Convention', the criteria used are a vehicle for disguised racial discrimination as defined in the CERD"[122]. This reading is anything but "obvious": it is entirely circular. It again reveals the UAE's failure to understand the difference between legitimate differentiation and unlawful discrimination. Contrary to the UAE's argument, the CERD Committee's aim is clear from the text itself: to articulate when a "distinction" or differential treatment rises to the level of unlawful discrimination, and in so doing, to reinforce the CERD's protection against nationality-based discrimination.

2.49 As explained in Qatar's Memorial, the framework established by the CERD is not an outlier, but mirrors that taken under general international law and human rights law[123]. Indeed, the CERD has contributed critically in shaping that law by influencing the protection against discrimination in later instruments[124].

2.50 For example, the ECtHR has long taken the approach that "a distinction is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a *legitimate aim* or if there is not a *reasonable relationship of proportionality* between the means employed and the aim sought to be

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122 UAE Preliminary Objections, p. 72, para. 133.

123 *See* Qatar Memorial, pp. 105–106, paras. 3.54–3.55.

124 *See* **Memorial Vol. VI, Annex 150**, P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 100 ("Later definitions [of discrimination] build on . . . the example of ICERD.").

realised"[125]. This is particularly relevant in the context of nationality-based discrimination, as illustrated in the Council of Europe's Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms:

> "The notion of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the Convention. In particular, this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. . . . [M]ost if not all member states of the Council of Europe provides for certain distinctions based on nationality concerning certain rights or entitlements to benefits. The situations where such distinctions are acceptable are sufficiently safeguarded by the very meaning of the notion 'discrimination' . . . since distinctions for which an objective and reasonable justification exists do not constitute discrimination."[126]

2.51 The IACtHR has similarly noted that "not all differences in treatment are in themselves offensive to human dignity", taking the approach that distinctions will not constitute unlawful discrimination if "the difference in treatment has a legitimate purpose" and "there exists a reasonable relationship of proportionality

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125 ECtHR, *Marckx v. Belgium*, Application No. 6833/74, Plenary Judgment (13 June 1979), para. 33 (emphasis added) (internal quotations omitted) (citing *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Application Nos. 1474/62, 1677/62, 1769/63, 1994/63, 2126/64, Judgment (23 July 1968), para. 10).

126 Council of Europe, Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177 (2000) paras. 18–19 (citing ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application No. 9214/80, Judgment (28 May 1985), para. 72).

between these differences and the aims of the legal rule under review"[127]. Further, such aims must not be "unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind"[128].

2.52 Both the ACmHPR and the African Court on Human and Peoples' Rights have similarly explained that differences in treatment may be "justified" if they are "pertinent, in other words reasonable, and legitimate"[129]. And in addition to the CERD Committee, other United Nations treaty bodies similarly distinguish

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127 IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, No. OC-18/03 (17 September 2003), paras. 89, 91; *see also* IACtHR, *Marcelino Hanríquez et al. v. Argentina*, Report No. 73/00, Case No. 11.784 (3 October 2000), para. 37 (stating that a "distinction" involves discrimination when "the treatment in analogous or similar situations is different; . . . the difference has no objective and reasonable justification; [and] the means employed are not reasonably proportional to the aim being sought").

128 IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 (17 September 2003), para. 91.

129 African Court of Human and Peoples' Rights, *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. Tanzania*, Application Nos. 009/2011, 011/2011, Merits Judgment (14 June 2013), para. 119 ("To justify the difference in treatment between Tanzanians, the respondent has . . . invoked the existence of social needs of the people of Tanzania . . . . The question then arises whether the grounds raised by the Respondent State in answer to that difference in treatment enshrined in the above mentioned constitutional amendments are pertinent, in other words reasonable, and legitimate."); African Commission of Human and Peoples' Rights, Legal Resources Foundation v. Zambia, Communication No. 211/98, para. 67; *see also* African Committee of Experts on the Rights and Welfare of the Child, *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v. Kenya*, Communication No. 02/2009, para. 57 ("For a discriminatory treatment to be justified, the African Commission has rightly warned that 'the reasons for possible limitations must be founded in a legitimate state interest and . . . limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.'").

between lawful distinctions and an unlawful discrimination on the basis of legitimacy and proportionality[130].

2.53 Further, the UAE argues that the "widely accepted practice" of States to differentiate between citizens and non-citizens with respect to other rights enumerated in Article 5 (such as the right to social security and social services) "would be in breach of Article 5" under Qatar's interpretation of the CERD[131]. But this argument just confuses a permissible distinction with unlawful discrimination and has been directly refuted by the CERD Committee. Indeed, the CERD Committee has previously made clear that reserving certain rights to citizens is consistent with the CERD, while also stressing that "human rights are,

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[130] The Human Rights Committee, for example, stated in its General Comment No. 18 on Non-discrimination that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]". **Vol. II, Annex 7**, Human Rights Committee, *General Comment No. 18: Non-discrimination*, document HRI/GEN/1/Rev.9 (10 November 1989), para. 13; *see also* Human Rights Committee, *Michael Andreas Müller and Imke Engelhard v. Namibia*, Communication No. 919/2000 (26 March 2002), para. 6.7 ("[D]ifferent treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant … places a heavy burden on the State party to explain the reason for the differentiation"). Likewise, the Committee on Economic, Social and Cultural Rights stated in its General Comment No. 20 on Non-discrimination that "[d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects." **Vol. II, Annex 8**, Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, document E/C.12/GC/29 (2 July 2009), para. 13.

[131] UAE Preliminary Objections, p. 45, para 83.

in principle, to be enjoyed by all persons" and should be guaranteed to citizens and non-citizens equally "to the extent recognized by international law"[132].

2.54 The context of Article 1 thus makes clear that discrimination on the basis of nationality falls within Article 1(1)'s prohibition on national origin-based discrimination, and that Article 1(2)'s exception allowing distinctions between citizens and non-citizens does not exclude nationality-based discrimination from the CERD's protective scope.

3. "National Origin" Must Encompass Current Nationality in Light of the CERD's Object and Purpose of Eliminating All Forms of Racial Discrimination

2.55 Under the interpretive framework set forth in the VCLT, the term "national origin" must be read in light of its object and purpose. The CERD must also be understood in light of the protective character of human rights instruments more generally, which, as acknowledged by the Court, requires an interpretation that will ensure that the treaty is *effective* in achieving its objective[133].

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132 **Memorial Vol. IV, Annex 109**, CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens, Sixty-fifth Session* (2005), para. 3 ("Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons.").

133 Qatar Memorial, pp. 112–114, paras. 3.65–3.67; IACtHR, *Velasquez Rodriguez v. Honduras, Preliminary Objections*, Judgment (26 June 1989), para. 30; ECtHR, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment (7 July 1989), para. 87. As noted in Qatar's Memorial, the Court itself has endorsed such an approach to the interpretation of human rights treaties, guided, for example, in its 1951 Advisory Opinion on *Reservation to the Convention on Genocide*, by the "authority of the moral and humanitarian principles which are [the] basis [of the Genocide Convention]". Qatar Memorial, pp. 112–113, para. 3.65.

2.56 As set forth in Qatar's Memorial, the CERD's drafting was informed by the principle that all persons are equal and should equally enjoy human rights[134]. To that end, the CERD's Preamble references both the Charter of the United Nations and the Universal Declaration of Human Rights (the "***UDHR***"), and considers that these instruments are "based on the principles of the dignity and equality inherent in all human beings". It further proclaims "that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, *without distinction of any kind, in particular* as to race, colour or national origin"[135].

2.57 The CERD's Preamble also reflects the drafters' intent that the CERD would not remain static, but would form a comprehensive network of protections that would apply to racial discrimination however it manifests, across different countries, contexts, and time periods. To this end, the drafters expressly did not seek to list the various forms of racial discrimination in the Preamble, deliberately choosing instead to reference certain specific examples ("colonialism and all practices of segregation and discrimination associated therewith", and "apartheid, segregation or separation"). At the same time, the drafters made clear that the CERD extends to "the necessity of speedily eliminating racial discrimination throughout the world *in all its forms and manifestations* and of securing understanding of and respect for the dignity of the human person"[136].

2.58 In the words of the delegate from Sudan,

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134 Qatar Memorial, p. 110, para. 3.61.

135 **Memorial Vol. III, Annex 92**, CERD, Preamble, paras. 1–2.

136 **Memorial Vol. III, Annex 92**, CERD, Preamble (emphasis added).

> "listing of the various forms of racial discrimination might weaken the Convention. Such a listing would be unwise not only because it would be difficult to draw up an exhaustive list, but also because there was no guarantee that other forms of racial discrimination *might not one day emerge* which would be automatically excluded from the scope of the Convention . . . In any event, in a legal document of [such importance as the Convention], the most important question was that of principle. And on the principle that all forms of racial discrimination must be abolished all members of the Committee were agreed. *The Convention should state unequivocally a universal principle which would apply to all forms of racial discrimination and would be equally valid for the past, the present and the future*."[137]

Likewise, numerous other delegates expressed the consistent view that: "[t]he Convention was intended to condemn and provide *against not only the present forms of racial discrimination but any future forms as well*"[138]; "[t]he Convention was addressed to future generations . . . and its purpose was to enunciate the general principles by which they should be guided"[139]; and the Convention would be a "dynamic instrument" based on general principles, which covered not only the forms of discrimination that had compelled its creation, but also "any new

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137 **Vol. II, Annex 6**, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, document A/C.3/SR.1312 (20 October 1965), p. 117, para. 19 (emphases added).

138 **Memorial Vol. III, Annex 84**, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, document A/C.3/SR.1313 (21 October 1965), p. 122, para. 13 (Jamaican delegate).

139 **Vol. II, Annex 4**, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, document A/C.3/SR.1301 (12 October 1965), p. 70, para. 37 (Israeli delegate); *ibid.*, p. 70, paras. 40–42.

manifestation which might arise in the future"[140]. Doing so would "ensure" that the CERD could serve its purpose as "a universal defence against an evil present in *all ages*"[141].

2.59 It is precisely because the collective punishment of a group of individuals based on certain unlawful distinctions fundamentally compromises human dignity and equality that the *elimination* of such discrimination—not its reduction or

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[140] **Memorial Vol. III, Annex 84**, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, document A/C.3/SR.1313 (21 October 1965), p. 122, para. 11 (Ghanaian delegate); *see also* **Vol. II, Annex 5**, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, document A/C.3/SR.1302 (13 October 1965), p. 76, para. 12 (Iraqi delegate noting that his delegation "thought it best to avoid examples that enumerations in the draft Convention and to concentrate instead on basic principles. While it might be possibly to identify some past practices and doctrines, no one could foresee what new forms of racism might arise in the future."); **Memorial Vol. III, Annex 84**, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, document A/C.3/SR.1313 (21 October 1965), p. 126, para. 46 (Guinean delegate agreeing that reference to specific forms of discrimination was unnecessary and explaining that "[t]o make that text more explicit would be to limit it. New and even worse forms of racial discrimination might arise in the future and it would then be necessary to add them to the list.").

[141] **Vol. II, Annex 4**, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, document A/C.3/SR.1301 (12 October 1965), p. 70, paras. 40–42 (French delegate stating "[h]is Government had always believed, for reasons of principle, that a legal instrument should be worded in *general and abstract terms* in order to permit the accession of the greatest possible number of parties and to ensure a universal defence against an evil present in *all ages*. . . . It was fully aware that the *abstract concept of racial discrimination* could legitimately call to mind one particular manifestation or another, past or present, of racial prejudices, and its greatest concern was the establishment of an effective and applicable text. Nevertheless . . . it must be observed that the mention of one particular form of racial discrimination was liable to weaken the scope of the Convention."). The delegates expressed the same intent during early sessions of the General Assembly, during discussions of the Draft Declaration on the Elimination of Racial Discrimination. *See, e.g.*, **Vol. II, Annex 3**, United Nations, *Official Records of the General Assembly, Eighteenth Session, Third Committee*, document A/C.3/SR.1218 (2 October 1963), pp. 36–37, para. 18) (French delegate explaining that the drafters of the Draft Declaration then under consideration by the Third Committee, "meaning to make its scope permanent and universal, had cast it in general terms, for they could not list all the forms which racial discrimination had taken in the past, or foresee all that it might take in the future").

mitigation—stands as a core obligation under the CERD[142]. As explained in the authoritative commentary on the CERD,

> "[i]n light of the ambition expressed in the [CERD] to eliminate racial discrimination, and a human rights approach *pro homine* and *pro femina*, it is reasonable to prefer effective interpretations that protect the widest span of potential victims"[143].

2.60 These are the foundational principles on which the CERD is based, and they provide the critical context for the CERD's object and purpose.

2.61 To aid in accomplishing its goal, the CERD's drafters established the CERD Committee as a standing body to monitor compliance and "give effect to the provisions of this Convention"[144]. The CERD Committee has emphasized that "[t]he Convention . . . is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society"[145], leading it to

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142 Following the same logic and basic principle, international humanitarian law prevents the imposition of collective punishment (including harassment) on the basis of something other than individual culpability. *See, e.g.*, ICRC Customary International Law database, Rule 103, "Collective punishments are prohibited", https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule103 ("State practice establishes [the prohibition on collective punishment] as a norm of customary international law applicable in both international and non-international armed conflicts.").

143 **Memorial Vol. VI, Annex 150**, P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 158.

144 **Memorial Vol. III, Annex 92**, CERD, Arts. 8(1), 9(1).

145 **Memorial Vol. IV, Annex 112**, CERD Committee, *General Recommendation No. 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, document CERD/C/GC/32 (24 September 2009), p. 2, para. 5.

"arrive[ ] at distinctive stances weighted towards the aims and objectives of the Convention, utilizing the principle of effectiveness in the interpretation of treaties and an emphasis on evolving practice"[146]. And in order to give effect to the CERD's object and purpose, the CERD Committee has expressly relied on "national origin" to assess violations of the Convention in the context of nationality-based discrimination between different non-citizen groups. The CERD Committee has also repeatedly found that nationality-based discrimination is prohibited under the CERD, including by specifically "urg[ing] the State party to ensure effective oversight of decisions made by municipalities and other public bodies to ensure that they do not discriminate *on the basis of nationality and other grounds prohibited by the Convention*"[147].

2.62 The CERD Committee's recognition of the CERD's prohibition on nationality-based discrimination on the basis of "national origin"—consistent with the interpretations and practice of other human rights bodies[148]—reflects the recognition that discrimination against non-nationals is, in the words of the CERD Committee, "one of the main sources of contemporary racism"[149]. And in fact,

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146 **Vol. II, Annex 14**, P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 490.

147 CERD Committee, *Concluding observations on the combined eighteenth to twenty-second periodic reports of Lebanon*, document CERD/C/LBN/CO/18-22 (5 October 2016), para. 38 (emphasis added); *see also* Qatar Memorial, pp. 101–105, paras. 3.47–3.53 (describing Concluding Observations to Switzerland (1998); Dominican Republic (2008); United States (2008); Australia (2010); Tajikistan (2012); Canada (2012); Pakistan (2016); Algeria (2017); Peru (2018); and Japan (2018)).

148 *See* paras. 2.26–2.28.

149 **Memorial Vol. IV, Annex 109**, CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens, Sixty-fifth Session* (2005), Preamble, para. 2.

discrimination against non-nationals often takes the form of discrimination on the basis of nationality[150].

2.63 The UAE nevertheless argues that excluding present nationality from the scope of the CERD's protections would accord with its object and purpose. But the UAE's attempt to construe the CERD's Preamble as somehow limiting its protections to the racial issues (such as apartheid, segregation and separation) that were most prominent during its drafting[151] ignores the fact that "racial discrimination" *in the context of the CERD* is clearly defined more broadly. The

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[150] This is recognized, for example, by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, document A/HRC/4/26 (29 January 2007), p. 8, para. 36 ("Terrorist profiling based on national or ethnic origin and religion has also been used in the context of immigration controls", citing as an illustrative example immigration policies and practices of the United States that "single out certain groups of immigrants based on their *country of origin or nationality*") (emphasis added); Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, document A/HRC/29/46 (20 April 2015), p. 3, para. 2 ("Racial and ethnic profiling has been a persistent and pervasive issue" that often arises in the context of national security and immigration, defining "racial and ethnic profiling" as "commonly understood to mean a reliance by law enforcement, security and border control personnel on race, colour, descent or national or ethnic origin as a basis for subjecting persons to detailed searches, identity checks and investigations, or for determining whether an individual is engaged in criminal activity"); *ibid*, p. 18, paras. 63–64 (concluding "[r]acial and ethnic profiling in law enforcement constitutes a violation of human rights for the individuals and groups targeted by these practices, because of its fundamentally discriminatory nature", and noting that human rights instruments including the CERD provide a framework for combatting such profiling); Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, document A/HRC/38/52 (25 April 2018), p. 14, para. 42 (expressing "grave concern about the growing number of States that have threatened and even adopted blanket bans against refugees of particular . . . national origin, most commonly . . . Muslim majority countries").

[151] UAE Preliminary Objections, p. 33, paras. 53–55; *see also* CR 2018/13, p. 43, para. 40(d) (Olleson) (quoting the CERD's Preamble).

UAE's argument thus not only directly contravenes the CERD's plain text, but also the CERD's overarching and protective object and purpose of eliminating *all forms* of racial discrimination.

2.64 Specifically, carving out nationality-based discrimination from the CERD's protections would lead to absurd results that are wholly at odds with that purpose. Indeed, nationality is among the most obvious ways to implement a discriminatory purpose and an easily identifiable characteristic on which such behavior may be based. In other words, nationality-based discrimination is the simplest method of targeting individuals who are "different" from the native population in terms of, for example, race, ethnic origin, or national origin. The UAE's interpretation of the CERD would also have the perverse consequence of immunizing *all* immigration policies and practices—which are tied to an individual's legal nationality—by placing them categorically outside of the CERD's protective scope. As a result, excluding discrimination based on nationality from the protections of the CERD would open up a startling hole in protections intended to be comprehensive, not haphazard[152].

2.65 For example, the UAE's interpretation would have prohibited discrimination under the CERD against persons of Kazakh origin prior to the breakup of the Soviet Union, but then would permit discrimination against those very same persons once Kazakhstan became an independent State, so long as the State enacting the measures framed the distinction as based on nationality alone[153]. Similarly, the UAE's interpretation would prohibit discrimination against

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[152] Qatar Memorial, p. 115, para. 3.68.

[153] Qatar Memorial, p. 112, para. 3.64.

Arabs, but would allow discrimination against nationals of all states comprising the League of Arab States. It would prohibit discrimination against persons of African descent, but not discriminatory measures enacted against nationals of African States. And so on.

2.66 Further, the UAE's attempt to unjustifiably narrow the CERD's scope also contradicts the drafters' clear intent that the terms of Article 1(1) evolve in meaning over time to ensure that the CERD's protections remain comprehensive by continuing to be contemporary[154]. In this respect, only Qatar's interpretation is consistent with the evolutive approach towards the interpretation of reservations and treaties, endorsed by the Court where appropriate to give effect to the intention of the drafters and ensure that the instrument is effective.

2.67 For example, in the *Navigational Rights* case, the Court explained that:

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances *it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon*

[154] Qatar Memorial pp. 124–125, para. 3.83.

> *each occasion on which the treaty is to be applied*"[155].

2.68 As the Court further explained in the *South West Africa* Advisory Opinion:

> "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that *the concepts embodied* in Article 22 of the Covenant—'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned—*were not static, but were by definition evolutionary*, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, *the Court must take into consideration the changes which have occurred in the supervening half-century*, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. *Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*."[156]

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155 *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, para. 64 (emphasis added); *see also Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, para. 77 (finding that, where drafters chose to adopt a generic term, presumption necessarily arises that "its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time").

156 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, para. 53 (emphases added).

2.69 The protective function of a human rights treaty in particular requires that it be given an evolutive interpretation. In the words of the IACtHR:

> "The Court has pointed out, as the European Court of Human Rights has too, that human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolutive interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well those set forth in the Vienna Convention on Treaty Law."[157]

2.70 As was the case in *South West Africa*, the "concepts embodied" in the CERD—namely the need to adopt "all necessary measures" to eliminate racial discrimination in the service of promoting "understanding between races and to build an international community free from all forms of racial segregation and racial discrimination"[158]—by their very nature were not static. Rather, the CERD was intended to remain closely aligned with racial discrimination in its current forms, in order to remain relevant over time and in light of contemporary realities.

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[157] IACtHR, *Case of the "Mapiripan Massacre" v. Colombia (Merits, Reparations, and Costs)*, Judgment (15 September 2005), para. 106; *see also* ECtHR, *Tyler v. United Kingdom*, Application No. 5856/72, Judgment (15 March 1978), para. 31 (human rights treaties to be interpreted as "living instrument[s]", "to be interpreted in the light of present-day conditions"); ECtHR, *Soering v. United Kingdom*, Application No. 1403/88, Judgment (7 July 1989), para. 102.

[158] **Memorial Vol. III, Annex 92**, CERD, Preamble.

2.71 For all these reasons, contrary to the UAE's position, its unduly narrow interpretation cannot be considered a good faith interpretation of the CERD[159].

4. The Subsequent State Practice the UAE Cites Does Not Support Its Position

2.72 Article 31(3) of the VCLT provides that, in interpreting the terms of a treaty, "[t]here shall be taken into account, together with the context . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[160]. The UAE relies on this provision to argue that the subsequent practice of States parties to the CERD "confirms that differentiation based on nationality or citizenship does not constitute 'racial discrimination'"[161].

2.73 But, in its review of State practice, the UAE does not distinguish between examples of nationality-based discrimination and legitimate and proportionate "differentiation" based on nationality. It simply equates the two to argue that Qatar's interpretation is untenable because it sweeps in innocent conduct. But that is just not the case. None of the examples cited by the UAE relating to visa-free entries, voting rights, extension of educational government scholarships, *etc.*[162]

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159 *See* UAE Preliminary Objections, pp. 47–48, paras. 87–90 (arguing that the requirement to interpret a treaty in good faith "confirms" the UAE's interpretation of "national origin").

160 VCLT, Art. 31(3).

161 UAE Preliminary Objections, p. 63.

162 *See* UAE Preliminary Objections, pp. 64–69, paras. 119–125 (citing as examples a number of States that: allow visa-free entry to particular nationals; grant voting rights to particular nationals; extend certain educational privileges, including government scholarships, to particular nationals; allow particular nationals to work in the country without first obtaining a permit; require particular nationals to meet certain conditions for approval of investments,

qualifies as nationality-based *discrimination*; instead, they are examples of legitimate and proportional distinctions made by States as between different non-citizen national groups.

2.74 As explained above and in Qatar's Memorial, not every distinction gives rise to unlawful discrimination under Article 1(1); rather, the concepts of legitimacy and proportionality must be taken into account in determining whether a given measure constitutes unlawful discrimination[163]. Consistently, the CERD does not require effectively granting most-favored-nation status for *any* difference in treatment; rather, it prohibits States from enacting measures that have the "purpose or effect" of nullifying or impairing the equal enjoyment, recognition, or exercise of human rights and fundamental freedoms by individuals of a certain nationality. Thus policies and practices that distinguish between different nationality groups are not *inherently* contrary to the CERD—just as policies that distinguish on the basis of, for example, ethnic origin (*e.g.*, providing university scholarships to certain indigenous groups) are not inherently contrary to the CERD, and in certain cases are explicitly permitted—or even mandated—as special measures under Article 1(4)[164].

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pursuant to free trade agreements made with those nationals' home countries; and grant social security and other benefits to particular nationals).

163 *See* paras. 2.45–2.53, above; Qatar Memorial, p. 82, para. 3.15; *ibid.*, p. 107, para. 3.57.

164 Article 1(4) provides: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." **Memorial Vol. III, Annex 92**, CERD, Art. 1(4); *see also* **Memorial Vol. IV, Annex 112**, CERD Committee, *General*

2.75 The CERD Committee previously has found measures taken by States against certain groups to be discriminatory where, for example, they were unnecessary and disproportionate because there were available "less invasive" ways of achieving the stated aim[165], where the measures were meant to be temporary but were "systematically renewed" and expanded[166], or where the measure applied indiscriminately to all individuals of "foreign" ethnic origin[167].

Recommendation No. 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, document CERD/C/GC/32 (24 September 2009), paras. 11–38 (describing "special measures" or "affirmative action" as permitted under the CERD); **Memorial Vol. III, Annex 92**, CERD, Art. 2(2) ("States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.").

165 *See L.G. v. Korea*, Communication No. 51/2012, Opinion, document CERD/C/86/D/51/2012 (12 June 2015), para. 3.4 ("While the Ulsan Metropolitan Office of Education's aim of employing only ethically and morally qualified teachers may be reasonable, the procedure adopted [a policy of testing foreign teachers of English for possible use of drugs] is not proportional to the aim pursued, and less invasive ways of evaluating the petitioner's 'moral consciousness' could have been adopted.").

166 *See* CERD Committee, *Concluding observations on the tenth to thirteenth period reports of Israel*, document CERD/C/ISR/CO/13 (14 June 2007), p. 4, para. 20 (noting with concern that measures implemented by the Citizenship and Entry into Israel Law (Temporary Order) of 31 May 2003 had "a disproportionate impact on Arab Israeli citizens wishing to be reunited with their families in Israel" and that, "[w]hile noting the State party's legitimate objective of guaranteeing the safety of its citizens, the Committee is concerned that these 'temporary' measures have systematically been renewed, and have been expanded to citizens of 'enemy States'").

167 *See Murat Er v. Denmark*, Communication No. 40/2007, Opinion, document CERD/C/71/D/40/2007 (8 August 2007), para. 7.3 ("[T]he Committee observes that the uncontroversial fact that one of the teachers at the school admitted having accepted an employer's application containing the note 'not P' next to his name and knowing that this meant that students of non-Danish ethnic origin were not to be sent to that company for traineeship is in itself enough to ascertain the existence of a *de facto* discrimination towards all non-ethnic Danish students, including the petitioner . . . . Indeed, irrespective of his

2.76 The CERD Committee has also reiterated on numerous occasions that distinctions made by States between non-citizens and citizens, or between different groups of citizens, must be legitimate and proportional. In that context, the CERD Committee has reminded States, for example, "that security measures taken in response to legitimate security concerns" such as the "present context of violence" should be "guided by proportionality [and] implemented with full respect for human rights as well as relevant principles of international humanitarian law"[168].

2.77 The regulations and policies cited by the UAE in its Preliminary Objections as examples of "States Parties to the CERD . . . favour[ing] citizens of one State over citizens of another"[169]—including the examples of Qatar's own regulations—are largely examples of preferences afforded to a particular nationality group or groups, often pursuant to a bilateral or regional agreement granting reciprocal privileges to a State's own nationals.

2.78 For example, the UAE cites a number of examples of visa exemptions, but declines to note that many of these exemptions were enacted pursuant to reciprocal bilateral or regional agreements with other States[170]. It argues that

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academic records, his chances in applying for an internship were more limited than other students because of his ethnicity. This constitutes, in the Committee's view, an act of racial discrimination and a violation of the petitioner's right to enjoyment of his right to education and training under article 5, paragraph e (v) of the Convention.").

168 *See, e.g.*, CERD Committee, *Concluding observations on the tenth to thirteenth period reports of Israel*, document CERD/C/ISR/CO/13 (14 June 2007), pp. 2–3, para. 13.

169 UAE Preliminary Objections, p. 63, para. 117.

170 *See, e.g.*, **UAE Preliminary Objections Vol. IV, Annex 107**, List of Agreements on Mutual Visa Exemption Between the People's Republic of China and Foreign Countries (as of 24 December 2018), http://govt.chinadaily.com.cn/a/201712/08/WS5b784 aea498e855160e8d1f

States grant certain political, property, educational and other rights to nationals of some countries, while implicitly acknowledging that the examples provided—for example, the European Union, the Commonwealth, MERCOSUR, the South African Development Community, and CARICOM—involve regional agreements or long-standing political integration and historical ties[171].

5.html (listing 128 countries with which China has concluded agreements on mutual visa exemptions, in most cases for diplomatic, service, public affairs, and civil service (EU laissez-passer) passports or other "official" passports); **UAE Preliminary Objections Vol. IV, Annex 108**, Resolution 10535 of 2018, Ministry of Foreign Affairs, 14 December 2018, Arts. 1–5, http://www.cancilleria. gov.co/sites/default/files/FOTOS2018/resolucion_10535_del_14_de_diciembre_de_2018.pdf (in Spanish) (listing a number of exceptions by which nationals of certain States are exempt from visas, including "[n]ationals of those States with which Colombia has visa exemption agreements in force"); **UAE Preliminary Objections Vol. IV, Annex 110**, Ministerial Agreement No. 000031, Ministry of Foreign Affairs and Human Mobility, 2 April 2014, Art. 1, http://www.trabajo.gob.ec/wp-content/uploads/2015/03/ACUERDO-MERCOSUR.pdf (explaining that nationals of Mercosur Member Countries and Associated States do not require a visa); MERCOSUR in brief, MERCOSUR, https://www.mercosur.int/en/about-mercosur/mercosur-in-brief/ (describing Mercosur as a "regional integration process" with an objective to "promote a common space that generates business and investment opportunities through the competitive integration of national economies into the international market").

171 *See, e.g.*, **UAE Preliminary Objections Vol. IV, Annex 134**, United Kingdom, Representation of the People Act 2000, ss. 1, 2 (granting "voting rights to citizens of the Republic of Ireland and of some Commonwealth States"); Position Paper by the United Kingdom, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf (explaining that reciprocal rights are granted pursuant to agreements in support of a Common Travel Area, "a special border-free zone comprising the UK, Ireland, the Channel Islands and the Isle of Man"); **UAE Preliminary Objections Vol. IV, Annex 139**, Protocol on education and training in the Southern African Development Community, Preamble, Art. 7(A) (providing for special fees and accommodation to nationals of Member States, the protocol recognizes that "a concerted effort by Member States is necessary to adequately equip the Region for the 21st century and beyond" and that such effort "can only be effected through the implementation of coordinated comprehensive and integrated programmes of education and training that address the needs of the Region"); **UAE Preliminary Objections Vol. IV, Annex 145**, Jamaica, Foreign Nationals and Commonwealth Citizens (Employment) Act, s. 3 (providing that nationals of States belonging to CARICOM, a regional community, do not require a work visa in Jamaica, a CARICOM State); **UAE Preliminary Objections Vol. IV, Annex 146**, Singapore, Housing and Development Board, Regulations for Renting

2.79 The examples provided by the UAE thus generally have a legitimate aim, *e.g.*, to ensure that a State can fully provide for its own citizens, or—in the case of reciprocal privileges agreed between two States—to promote closer relations between those States. These types of measures do not disproportionately impact the exercise of human rights by all other nationality groups; nor do they single out any particular nationality group for adverse treatment. As noted in Qatar's Memorial, the CERD Committee has thus not generally characterized such distinctions as violations of the CERD[172].

2.80 The UAE's Discriminatory Measures are fundamentally different in kind from the nationality-based distinctions described above, and they bear no resemblance to the other examples of State practice of "immigration restrictions" relied on by the UAE in its Preliminary Objections. Specifically, the UAE's measures include sweeping and blanket expulsion orders and immigration bans against individuals of one nationality, while facilitating a media campaign that negatively stereotypes their national identity. And even if one accepts the UAE's stated aim of "security reasons" as sincere, there is no basis for the UAE to argue that its measures are proportional visa restrictions akin to those examples[173].

Out Your Flat, http://www.hdb.gov.sg/cs/infoweb/residential/renting-a-flat/renting-from-theopen-market/regulations-for-renting-out-your-flat (explaining that a Non-Citizen Quota for Renting Out of Flat is set for all non-citizens "to help maintain a good ethnic mix in HDB estates" and that "Malaysians are not subject to this quota in view of their close cultural and historical similarities with Singaporeans").

172 Qatar Memorial, p. 107, para. 3.57; *see also* **Vol. II, Annex 9**, *Summary Record of the Two Hundred and Twelfth Meeting*, document CERD/C/SR.212 (20 August 1974), p. 127. For example, the UAE notes that "Australia requires citizens of other States to obtain a visa to enter Australia—apart from citizens of New Zealand who may enter without one". UAE Preliminary Objections, p. 64, para. 119.

173 UAE Preliminary Objections, pp. 64–66, para. 119.

2.81 While nationality is, for example, logically tied to the legitimate aim of promoting State-to-State cooperation and coordination—a State may grant preferences to citizens of particular other States based on its relationships with those States—it is *not* directly tied to an individual's proclivity to commit an act that threatens State security. As the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has explained, "[t]he available evidence suggests that profiling practices based on . . . national origin . . . are an unsuitable and ineffective, and therefore a disproportionate, means of countering terrorism: they affect thousands of innocent people, without producing concrete results"[174].

2.82 Further, the UAE's Discriminatory Measures were not implemented pursuant to a reciprocal agreement between States, but were unilaterally imposed. In fact, those Measures were implemented in *contravention* of the regional regime and of historical rights of free movement in the region. Indeed, the special status enjoyed by Qataris historically and over time within the territory of the UAE—in which they are entitled to many of the same rights and benefits as UAE citizens—makes clear that the UAE's Measures constitute discrimination prohibited on the ground of "national origin" under Article 1(1), rather than permissible distinctions or restrictions against non-citizens motivated by a legitimate aim[175].

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[174] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, document A/HRC/4/26 (29 January 2007), paras. 54–55 (noting also that "terrorist-profiling practices entail considerable negative effects that must also be factored into the proportionality assessment").

[175] *See* Qatar Memorial, pp. 282–288, paras. 5.85–5.93.

2.83 In any case, the UAE's Discriminatory Measures could never be considered legitimate and proportional because they were implemented in pursuit of an illegitimate aim, and not the UAE's stated aim of "security reasons". As explained above and in Qatar's Memorial, the UAE has explicitly stated that the aim of its Discriminatory Measures was to punish Qatar for its alleged wrongdoing[176]. To do so, the UAE implemented measures that would impact the people most closely connected to Qatar—not only Qatari passport holders, but all individuals of Qatari national origin—and did so on a collective basis, with no individualized consideration.

2.84 In sum, the UAE cites *no State practice* akin to its own conduct, and the examples of "State practice" on which the UAE tries to rely show the *exact opposite* of that conduct. The UAE gains no support from its "comfort in numbers" approach, but only demonstrates how objectionable its conduct actually was.

2.85 Finally, the UAE has not even shown that its examples qualify as subsequent practice under Article 31(3)(b) of the VCLT. Even on its own account, the examples the UAE cites were not made "in application of the treaty" such that they indicate any understanding as to whether nationality-based discrimination falls within the CERD's scope. While the non-application of a treaty can be relevant, it must be done in circumstances where the treaty provisions at issue "might have been thought to be applicable"[177], which is not the case here. In

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[176] *See* Qatar Memorial, pp. 4, 9, paras. 1.8, 1.19; *see* paras. 1.8, 2.4, 2.11, above.

[177] **Vol. II, Annex 19**, O. Dörr & K. Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018), pp. 598–599 ("[T]he interpreter may . . . consider the practice of the parties in the 'non-application of the treaty', *ie* draw conclusions from the fact that the parties did not apply their treaty when treaty provisions might have been thought

Legality of the Threat or Use of Nuclear Weapons, for example, the Court observed that:

> "the Regulations annexed to the Hague Convention IV do not define what is to be understood by 'poison or poisoned weapons' and that different interpretations exist on the issue. . . The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons."[178]

2.86 In contrast, nothing in domestic regulations cited by the UAE clarifies the States parties' understanding of the meaning or scope of "national origin" under the CERD, nor has the UAE shown that the States parties intended to so clarify. Nor is the fact that these examples of domestic legislation have not been challenged under the CERD evidence that States consider them to fall outside the CERD's purview. The lack of challenge could be attributable to many factors,

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to be applicable"); *see also* International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* (2018), document A/73/10, Conclusion 4 ("A subsequent agreement under article 31, paragraph 3(a) is an agreement 'regarding' the interpretation or the application of its provisions. The parties must therefore intend, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied"); *ibid.*, Conclusion 10 ("Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction. . . . From the outset, the Commission has recognized that an 'agreement' deriving from subsequent practice under article 31, paragraph 3(b), can result, in part, from silence or inaction by one or more parties. . . . The 'circumstances' that will 'call for some reaction' include the particular setting in which the States parties interact with each other in respect of the treaty.").

[178] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 55.

including an understanding that the States parties consider the measures to be legitimate and proportional distinctions on the basis of nationality and thus justifiable under the CERD[179]. As such, it is of little, if any, relevance for the purposes of Article 31(3)(b).

B. Supplementary Means of Interpretation Confirm That "National Origin" Encompasses Nationality

2.87 Article 32 of the VCLT provides that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."[180]

2.88 As set forth in detail in Qatar's Memorial[181], and as reiterated in response to the UAE's Preliminary Objections, in the following sections, the *travaux préparatoires* of the CERD confirm that "national origin" as used in Article 1(1) encompasses present nationality (***Part 1***).

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179 *See also* International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* (2018), document A/73/10, Conclusion 6 ("The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, *have taken a position regarding the interpretation of the treaty*.") (emphasis added).

180 VCLT, Art. 32.

181 *See* Qatar Memorial, pp. 115–125, paras. 3.69–3.84.

2.89 Further, as explained below, the preparatory works of contemporaneous human rights instruments such as the UDHR, the International Labour Organization Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (the "***ILO Convention***") and the UNESCO Convention against Discrimination in Education (the "***UNESCO Convention***") do not constitute the "circumstances of the CERD's conclusion" and therefore are not relevant to the interpretation of the CERD under Article 32 of the VCLT. But in any event, the use of "national origin" in these instruments likewise confirms that nationality-based discrimination is prohibited by the CERD (***Part 2***).

1. The Travaux Préparatoires *Confirm That the Drafters Rejected Language Excluding Nationality from the Protections of the CERD*

2.90 The UAE argues that the *travaux préparatoires* of the CERD indicate the drafters' intent to exclude nationality-based discrimination from its scope. But the UAE's argument is based on a fundamentally flawed premise: that the drafters who sought to exclude present nationality from Article 1(1) would only have agreed to the inclusion of "national origin" "if it was without doubt that 'national origin' did not include current nationality in the sense of citizenship"[182].

2.91 There is nothing in the *travaux* to suggest that the drafters' acceptance of the "compromise amendment" that became Article 1 was contingent on any particular definition of "national origin". Rather, as set forth in detail in Qatar's Memorial, while the drafters of the CERD declined to precisely define "national

[182] UAE Preliminary Objections, p. 62, para. 114.

origin", they expressly rejected attempts to exclude present nationality from its scope[183].

2.92 Specifically, as even those excerpts from the *travaux* relied upon by the UAE confirm[184], at all three stages of drafting, delegates understood "national origin" as encompassing nationality in the sense of citizenship; this is *precisely why* they worried that its inclusion would prohibit States from making legitimate distinctions between citizens and non-citizens and, in some cases, felt the need to propose amendments that would have explicitly excluded nationality-based discrimination from the scope of Article 1(1)[185]. Ultimately, however, such a carve-out *was never adopted*. Instead, the drafters of the CERD, aiming to create a comprehensive definition of "racial discrimination" that would leave no vulnerable group without protection, included "national origin" in Article 1(1) with full recognition that it could encompass nationality-based discrimination[186].

2.93 The UAE essentially argues that, even though the proposed amendments that would have explicitly excluded nationality-based discrimination were not adopted, the underlying goal of those amendments must still be read into the text of Article 1. Not only is this inconsistent with treaty interpretation under the VCLT, it also disregards the drafters' deliberations and reasons for not adopting these amendments. For example, as the UAE explains in its Preliminary

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183 *See* Qatar Memorial, pp. 120–123, paras. 3.77–3.81.

184 *See* UAE Preliminary Objections, pp. 60–61, para. 113 (quoting delegates from Austria, Senegal and Hungary); *see also* Qatar Memorial, pp. 129–130, paras. 3.92–3.93 (quoting same).

185 *See* Qatar Memorial, pp. 117–127, paras. 3.69–3.84.

186 *See* Qatar Memorial, pp. 115–125, paras. 3.70–3.84.

Objections, the Sub-Commission on Prevention of Discrimination and Protection of Minorities considered a proposal to include "nationality" in Article 1(1), in quotation marks and with an explanatory footnote clarifying that "the article could not be interpreted as denying to a State its right to make special provisions regarding aliens within its territory"[187]. But the Sub-Commission's members rejected that amendment.

2.94 Even the delegates who might have preferred to exclude discrimination on the basis of nationality in the sense of citizenship from the CERD were not willing to do so if it meant that Article 1(1) would not cover any other possible association with a State or national group. The chairman explained that he was

> "convinced . . . of the need to include a diversity of terms in the definition . . . He agreed with Mr. Cuevas Cancino that the term 'national origin' was preferable to 'nationality', and he would certainly not be in favor of putting that word in quotation marks or using a foot-note. Such a procedure would not make for clarity, a primary requirement in the convention."[188]

[187] UAE Preliminary Objections, p. 54, para. 104 (citing delegate from India).

[188] **Memorial Vol. III, Annex 74**, United Nations, *Official Records of the Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sixteenth Session,* document E/CN.4/Sub.2/SR.411 (5 February 1964), p. 10.

2.95 Indeed, when one delegate raised the suggestion that "nationality" and "national origin" fell outside the scope of the CERD entirely, others rejected this view, as also reflected in the final text adopted by the Sub-Commission[189].

2.96 Other delegates stressed the importance of including either "nationality" or "national origin" to ensure that the scope of the CERD covered discrimination that would not otherwise be covered by the other terms of Article 1(1), noting in particular that "'national origin' and 'ethnic origin' were not synonymous"[190]. The drafters maintained throughout that the definition of racial discrimination "should be as broad and explicit as possible"[191] and should "include a diversity of terms"[192], in line with the far-reaching aims of the proposed convention. Ultimately, the Sub-Commission dealt with concerns over the CERD's application to non-citizens through an interpretive article that clarified the CERD would not

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189 **Memorial Vol. III, Annex 74**, United Nations, *Official Records of the Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sixteenth Session*, document E/CN.4/Sub.2/SR.411 (5 February 1964), pp. 5–6 (reflecting comment by Mr. Capotorti that "the problems of national origin and nationality were manifold, but they were outside the scope of a convention designed to protect the rights of the individual"); *see, e.g., ibid.*, p. 7 (reflecting comment by Mr. Abram that he "preferred Mr. Krishnaswami's position on the question of nationality [*e.g.*, the proposal to include 'nationality' in quotation marks with an explanatory footnote] to Mr. Capotorti's").

190 **Memorial Vol. III, Annex 74**, United Nations, *Official Records of the Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sixteenth Session*, document E/CN.4/Sub.2/SR.411 (5 February 1964), p. 7; *see also ibid.*, p. 5 ("[T]he problem of ethnic discrimination should not . . . be equated with discrimination on grounds of national origin or nationality.").

191 **Memorial Vol. III, Annex 74**, United Nations, *Official Records of the Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sixteenth Session*, document E/CN.4/Sub.2/SR.411 (5 February 1964), p. 4.

192 **Memorial Vol. III, Annex 74**, United Nations, *Official Records of the Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sixteenth Session*, document E/CN.4/Sub.2/SR.411 (5 February 1964), p. 10.

require States to grant equal "political or other rights" to non-nationals as compared to nationals[193].

2.97 The members of the Commission on Human Rights, which considered the Sub-Commission's draft, were likewise concerned that, in the UAE's words, "'national origin' could be construed to mean present nationality"[194], and thus that its inclusion would impact States' ability to make certain distinctions with respect to non-citizens. As in the Sub-Commission, however, the delegates kept the term "national origin"—which clearly could be understood as encompassing nationality in the sense of citizenship—despite the lack of consensus on its meaning. The summary report of the session notes on this point that some "representatives felt . . . that ['national or'] should be retained, since the Convention should protect persons against discrimination on grounds of national origin, provided that their status was not governed by laws relating to aliens, bilateral agreements on nationality, or such international instruments as the Convention on the Reduction of Statelessness"[195]—*e.g.*, methods by which States generally make legitimate distinctions between citizens and non-citizens. And again, while the UAE

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193 *See* UAE Preliminary Objections, pp. 55–56, para. 105 ("The Chairman of the Sub-Commission explained that this interpretive article was intended to indicate that the draft convention 'did not change the *status quo ante* with respect to the political rights of non-nationals'"). The interpretive article provided that "[n]othing in the present convention may be interpreted as implicitly recognizing or denying political or other rights to non-nationals nor to groups of persons of a common race, colour, ethnic or national origin which exist or may exist as distinct groups within a State party." **Memorial Vol. III, Annex 75,** United Nations, *Official Records of the Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sixteenth Session*, document document E/CN.4/873, E/CN.4/Sub.2./241 (11 February 1964), p. 49, Art. 8.

194 UAE Preliminary Objections, p. 57, para. 107.

195 **Memorial Vol. III, Annex 77**, United Nations, *Official Records of the Economic and Social Council, Commission on Human Rights, Twentieth Session*, document E/3873, E/CN.4/874 (1964), p. 25, para. 85.

emphasizes that the Commission on Human Rights recommended dealing with the concern of such legitimate distinctions by clarifying in express terms that "national origin" did not "cover the status of any person as a citizen of a given State,"[196] this language was ultimately rejected.

2.98 Likewise, where similar provisions were proposed during consideration of the draft convention by the Third Committee of the General Assembly,[197] they, too, were not adopted. Instead, as explained in Qatar's Memorial, the Third Committee dealt with the long-standing concern that "national origin" might impact States parties' ability to distinguish legitimately between citizens and non-citizens through the express exceptions of Articles 1(2) and 1(3)[198].

2.99 Accordingly, the UAE's argument that the drafters' acceptance of the final text of Article 1—including the Articles 1(2) and Article 1(3) exceptions—demonstrates there was consensus that "national origin" did not include present nationality, is just unsupported.

2.100 What is clear is that the drafters of the CERD understood that "national origin" could be interpreted to encompass present nationality and recognized that including present nationality may affect States' rights to make legitimate distinctions between citizens and non-citizens. However, because they intended to create a broad, comprehensive definition of "racial discrimination", they opted not

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196 **Memorial Vol. III, Annex 77**, United Nations, *Official Records of the Economic and Social Council, Commission on Human Rights, Twentieth Session*, document E/3873, E/CN.4/874 (1964), p. 111, Art. 1(1).

197 UAE Preliminary Objections, pp. 59–60, para. 112.

198 Qatar Memorial, pp. 120–123, paras. 3.78–3.81.

to expressly exclude discrimination based on present nationality from the stricture of Article 1(1). Rather, they adopted Articles 1(2) and 1(3), which expressly allow States to distinguish between citizens and non-citizens, so long as they do not discriminate against any particular nationality. Thus, contrary to the UAE's attempt to rewrite the record, the *travaux* support the view that "national origin" in Article 1(1) encompasses nationality-based discrimination.

2. The Circumstances of the CERD's Conclusion Do Not Support the UAE's Position

2.101 As an initial matter, the UAE is wrong to argue that the use of "national origin" in contemporaneous human rights instruments such as the UDHR, the ILO Convention, and the UNESCO Convention qualifies as "circumstances of the CERD's conclusion" under the VCLT.

2.102 According to Sir Humphrey Waldock, former Special Rapporteur on the Law of Treaties, the provision of Article 32 of the VCLT allowing recourse to the circumstances of the conclusion of a treaty "is intended to cover both the contemporary circumstances and the historical context in which the treaty was concluded"[199]. Specifically, the provision refers to the "*factual circumstances* present at the time of conclusion and the historical background of the treaty", which may help identify the motives of the parties[200]. It does not include the preparatory works of contemporaneous instruments, which are subject to their own specific purpose, specific context and specific mix of States Parties.

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[199] International Law Commission, *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, document A/CN.4/167, Add.1-3 (1964), p. 59, para. 22.

[200] **Vol. II, Annex 19**, O. Dörr & K. Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018), p. 624.

2.103 For example, the Court has previously referred to factual circumstances as provided in the CERD's own preparatory work, stating in *Georgia v. Russian Federation* that "at the time when CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States"[201]. But this is a statement of contemporary conditions and approaches to international law, clearly distinguishable from relying on the preparatory works of *other* human rights instruments to determine a particular term's ordinary meaning at a specific point in time, as the UAE seeks to do. Such circumstances are not relevant to the meaning of "national origin" in the CERD.

2.104 Even assuming that the preparatory works of contemporaneous human rights treaties are relevant, the UAE's argument still fails. Even if the UAE is right that the UDHR, the ILO Convention, and the UNESCO Convention "did not prohibit different treatment on the basis of nationality", it does not logically follow that these instruments "present a settled meaning of national origin at the time of drafting the CERD which did not encompass nationality", as the UAE argues[202].

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[201] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, para. 147.

[202] UAE Preliminary Objections, pp. 49–50, paras. 93–94.

2.105 Indeed, the drafters of the UDHR debated at length the meaning and scope of "national origin" *precisely because* they understood it could encompass present nationality[203].

2.106 Further, according to a preliminary report prepared by the International Labour Office for the International Labour Conference, "the concept of national origin" comprises two elements: "one is the natural distinction of foreign ancestry, the other is the juridical distinction of nationality"[204]. The ILO Convention's deliberate use of "national extraction" rather than "national origin" to exclude nationality-based discrimination from the treaty actually confirms that "national origin" was generally understood to encompass present nationality. Indeed, in its final report on the Convention, the International Labour Office pointed out that "it will be recalled that these words [national extraction] had been used in preference to 'national origin' in order to make it clear that nationality was not covered"[205].

2.107 In short, both as a legal and factual matter, there is no basis for the UAE's argument that the term "ought to have the same meaning" in the CERD based on certain contemporaneous instruments on which it relies. The supplementary means

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[203] For example, one of the drafters of the UDHR, Mr. McNamara (Australia) stated that "in his view [national origin] was synonymous with nationality, but that it might also have a wider meaning." Similarly, Ms. Monroe (United Kingdom) stated that the word "national" should be omitted from the UDHR because "'national origin' was liable to be confused with 'nationality'". **Vol. II, Annex 2**, United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *First Session, Summary Record of Fifth Meeting*, document E/CN.4/Sub.2/SR.5 (27 November 1947), pp. 7–8.

[204] **Vol. II, Annex 11**, International Labour Conference, *Discrimination in the field of employment and occupation*, 40th session, Geneva, 1957, Report VII(1), p. 17.

[205] *See* **Vol. II, Annex 12**, International Labour Conference, *Discrimination in the field of employment and occupation*, 42nd session, Geneva, 1958, Report IV(2), p. 8.

of interpretation cited by the UAE thus do not support its interpretation—to the contrary, they reaffirm the conclusion that nationality-based discrimination is prohibited under the CERD.

Section III. The Court Has Jurisdiction Because the UAE's Discriminatory Measures Discriminate Against Persons of Qatari "National Origin" in Both Purpose and Effect

2.108 As discussed in Section II of this Chapter, the UAE's conceded, explicit, and arbitrary targeting of Qatari nationals or citizens pursuant to its Expulsion Order and Travel Bans is alone sufficient to bring Qatar's claims within the scope *ratione materiae* of the CERD, since it demonstrates that these measures were enacted with the *purpose* of discriminating against Qataris[206].

2.109 However, even if the Court were to accept the UAE's view that national origin does *not* encompass nationality, it still possesses jurisdiction *ratione materiae* over Qatar's claim. Contrary to the UAE's attempt to persuade the Court that the Court need only consider whether "differentiation . . . on the basis of current nationality" falls within the CERD's definition of racial discrimination[207], the question of whether the term "national origin" encompasses "nationality" is not dispositive of Qatar's claims.

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[206] Qatar Memorial, pp. 4–5, paras. 1.8–1.9; *see also* UAE Preliminary Objections, pp. 20, 22, paras. 32, 34 (acknowledging that "the 5 June 2017 Statement announced a decision to give Qatari nationals 14 days to leave UAE territory for precautionary security reasons and to prevent the travel of Qatari nationals into the UAE" and stating that measures "were adopted with the aim of inducing Qatar to comply with its obligations under international law").

[207] *See* UAE Preliminary Objections, pp. 38–39, para. 68.

2.110 As a preliminary matter, and as described above, the UAE ignores the fact that, *even on their face*, many of its Discriminatory Measures are not limited to "Qatari citizens", but target Qataris broadly as a people and an identity[208]. Further, the UAE's attempt to narrow the Court's focus to the facially stated target of a particular measure is wholly inconsistent with Article 1(1) of the CERD, which protects against discrimination in both "purpose or effect" on the basis of national origin. Contrary to the UAE's characterization, Qatar's claims are based not on some minimal differential treatment of Qatari citizens or on "basic immigration control measures", but on the UAE's comprehensive, serious and coordinated discriminatory acts against Qataris. In determining whether the acts complained of are capable of falling within the CERD's scope, the Court must consider not only the facially stated purpose of the UAE's Measures, but also their discriminatory effects; namely, their "unjustifiable disparate impact upon a group distinguished by" national origin—here, persons of Qatari national origin (***Section II.A***).

2.111 As discussed in detail in Qatar's Memorial, the UAE's acts have "disproportionately impact[ed]" the fundamental human rights of Qataris—not just "Qatari citizens", but individuals who are Qatari by heritage, origin, or descent[209]. These individuals meet even the UAE's own, limited, interpretation of

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[208] *See* paras. 2.6, 2.12–2.13, above; *see also* Qatar Memorial, p. 126, para. 3.88. Notably, even the Expulsion Order and Travel Bans—which the UAE says *explicitly* target Qataris on the basis of nationality—are also of broader application than just "Qatari citizens", referring to all "Qatari residents and visitors in the UAE" and "all Qataris". *See* **Memorial Vol. II, Annex 1**, UAE Ministry of Foreign Affairs, *UAE supports statements of Kingdom of Bahrain and Kingdom of Saudi Arabia on Qatar* (5 June 2017). The UAE has not explained why its assertion that these references are to "current nationality" rather than to persons of Qatari origin are anything other than an *ex post facto* characterization in an attempt to avoid legal liability for its actions.

[209] Qatar Memorial, pp. 137–141, paras. 3.107–3.113.

the term "national origin" under Article 1(1), which the UAE defines as relating in particular to the nation of birth of an individual and his or her ancestors. Moreover, regardless of whether certain acts are facially targeted at "Qatari citizens", the facts and circumstances before the court demonstrate that this discriminatory effect on Qataris is also the intended *purpose* of the Measures, which are not routine government acts but an explicit program of deliberate discrimination[210]. Thus, even on the UAE's own case with respect to the interpretation of "national origin", the UAE's conduct falls within the CERD's scope based on its discriminatory effects on Qataris (***Section II.B***).

A. The UAE Ignores That the CERD Prohibits Discrimination Not Only in Purpose, But Also in Effect

2.112 The UAE is wrong in asserting that the Court's inquiry is limited to the explicit facial purpose of the measures. Rather, as described in Qatar's Memorial, the Court must consider *both* their "purpose" and "effect" more broadly, consistent with the CERD's plain text, the interpretations of the CERD Committee, the opinions of eminent jurists, and the general approach to anti-discrimination in human rights law.

2.113 To recall, Article 1(1) of the CERD defines racial discrimination as:

> "any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic

[210] Recently, the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights confirmed that the UAE's Discriminatory Measures continue to this day. *See* Human Rights Council, *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights*, document A/HRC/44/46 (5 July 2019), p. 11, para. 38 (noting that "[t]he restrictive measures imposed by various Gulf countries on Qatar remain in force").

> origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"[211].

2.114 The ability to protect against discrimination in effect or from a disguised discriminatory motive is not a subsidiary method for prohibiting discrimination. Rather, it is inherent in the concept of discrimination throughout international human rights law, which recognizes the illegality of measures that are neutral on their face, but nevertheless have the same discriminatory impact or illegitimate purpose as measures directly targeted at a protected group[212]. And as international human rights bodies and monitors have recognized, inclusion of such measures within the scope of illegality is a crucial component of an effective anti-discrimination regime[213]. Protection against discrimination in effect or from a disguised discriminatory purpose is thus a critical aspect of the CERD's protective

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211 **Memorial Vol. III, Annex 92**, CERD, Art. 1(1); *see also* Qatar Memorial, pp. 78–84, paras. 3.6–3.14; *ibid*., pp. 137–139, paras. 3.107–3.109.

212 *See* Qatar Memorial, p. 139, para. 3.110 ("Were the UAE simply allowed to evade responsibility by characterizing its actions as limited to 'current' nationality—notwithstanding the clear discriminatory effects arising from that demarcation—it would create a clear lacuna in CERD's protective coverage that is at odds with the CERD's object and purpose.").

213 *See, e.g.*, United Nations Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, document A/HRC/38/52 (25 April 2018), para. 14 ("There is no question that achieving racial equality requires robust action to deal swiftly and simultaneously with explicit racism and xenophobia, and with policies and institutions that achieve racial and xenophobic discrimination, even absent discernible racial or xenophobic animus.").

character, which plays a vital role in preventing and eliminating "*all forms* of . . . racial discrimination"[214].

2.115 The CERD Committee has confirmed that the CERD prohibits both "purposive or intentional discrimination and discrimination in effect"[215] and has explained that "[i]n seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin"[216]. This understanding of the CERD is in line with its broad purpose, as well as the fundamental principles on which the CERD was founded—the "dignity and equality" of all humans[217].

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214 **Memorial Vol. III, Annex 92**, CERD, Preamble, para. 10 (emphasis added); *see also* Qatar Memorial, pp. 137–138, para. 3.107.

215 *See* **Memorial Vol. IV, Annex 112**, CERD Committee, *General Recommendation No. 32 on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, document CERD/C/GC/32 (2009), p. 3, para. 7; *see also* Qatar Memorial, p. 81, para. 3.12; **Memorial Vol. IV, Annex 105**, CERD Committee, *General Recommendation No. 14 on article 1, paragraph 1, of the Convention*, document A/48/18 (1993), para 1.

216 **Memorial Vol. IV, Annex 105**, CERD Committee, *General Recommendation No. 14 on article 1, paragraph 1, of the Convention*, document A/48/18 (1993), para. 2; *see also* Qatar Memorial, p. 81, para. 3.12.

217 *See* **Memorial Vol. VI, Annex 150**, P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 129 (emphasis added) ("[T]he concept of equality reflected in the Convention combines formal equality before the law with equal protection of the law, while *de facto* equality in the enjoyment and exercise of human rights is the aim to be achieved by the implementation of its principles. The combination of phrases on equality in [the Committee's General Recommendation No. 32] implies that the Convention is concerned with objectives and outcomes as well as processes."); *see also* Qatar Memorial, pp. 78–82, paras. 3.6–3.14.

2.116 This understanding of the CERD's protective scope also was recognized by Judge Crawford in *Ukraine v. Russian Federation*:

> "The definition of 'racial discrimination' in Article 1 of CERD does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds. Moreover, whatever the stated purpose of the restriction, it may constitute racial discrimination if it has the 'effect' of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in CERD."[218]

2.117 Thus, the CERD is concerned not only with whether the UAE's Measures discriminate on their face, but also whether its actions have had an unjustifiable disparate impact or *in fact* are intended to discriminate against a protected class of individuals, in this case Qataris by national origin in the historical-cultural sense.

B. The UAE's Discriminatory Measures Disproportionately Impact Persons of Qatari "National Origin" and the UAE Intended Them to Have That Effect

2.118 As discussed above, the UAE seeks to narrow the scope of "national origin" in Article 1(1) by arguing that it refers only to immutable characteristics, is "necessarily informed by the link with the concept of 'ethnic origin'", and "denotes an association with a nation of people, not a State"[219]. In so doing, the

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[218] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, Declaration of Judge Crawford*, p. 215, para. 7; *see also* Qatar Memorial, p. 82, para. 3.11.

[219] UAE Preliminary Objections, pp. 41–43, paras. 76, 78; *see* para. 2.23, above.

UAE suggests, as it did at the first provisional measures phase, that "national origin" *does* encompass heritage and past nationality (*e.g.*, the nationality of one's birth)[220]. The UAE argues by way of example that "a person born in Canada to Canadian parents would be considered as having a Canadian national origin"[221].

2.119 While Qatar does not agree that this unduly limited formulation covers the totality of "national origin", the parties appear to agree that—at a minimum—"national origin" must encompass characteristics such as heritage, descent, and geographical origins; if it did not, the term would be stripped of all meaning. Here, the very characteristics that the UAE acknowledges serve to define a group by "national origin" are possessed by the population of Qataris disproportionately impacted by the UAE's Discriminatory Measures. To use the UAE's formulation, individuals "born in Qatar to Qatari parents" are exactly the population of Qataris by national origin that has been disparately impacted by the Discriminatory Measures.

2.120 Accordingly, Qatar's claims are plainly capable of falling within the CERD's scope *ratione materiae*, because they have both the purpose and the effect of discriminating against persons of Qatari national origin—even based on the UAE's incorrectly limiting interpretation of that term.

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220 CR 2018/13, pp. 38–39, para. 19 (Olleson) ("Notably, Qatar does not suggest that the relevant measures are of any application to UAE or foreign nationals of Qatari heritage (for instance where one of their parents was Qatari), nor even to those who were previously Qatari nationals but who have subsequently acquired a different nationality through marriage.").

221 UAE Preliminary Objections, p. 42, para. 76, n.139.

2.121 *First*, as Qatar explained in its Memorial, the characteristics that, according to the UAE, determine one's national origin—parentage, descent, and geographical ties to a State by virtue of being born there—apply to a historical-cultural community of Qataris that trace their origins to the Qatari nation and to the territory that is now recognized as the State of Qatar[222]. As detailed in the expert report of Dr. J.E. Peterson, "Qatari" is not only a nationality in the formal legal sense of citizenship, but also describes a national group that pre-dates the modern State, and one which the UAE recognizes[223]. A person's affiliation with this national group is defined by historical-cultural characteristics such as shared heritage or descent, particular family or tribal affiliations, shared national traditions and culture, and geographic ties to the area that became Qatar[224]. As Dr. Peterson explained:

> "The term 'national origin' . . . is often used, as here, to refer to the historically-based commonality of members of a social or political community who perceive themselves as belonging to the same nation. In this sense, national origin underpins the notion of a nation, whose members or citizens share the same nationality. While citizenship or nationality in the legal or political sense confers Qatari legal identity, *the sense of who is Qatari and*

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222 Qatar Memorial, pp. 130–141, paras. 3.94–3.112; **Memorial Vol. VI, Annex 162**, Expert Report of Dr. J.E. Peterson, pp. 22–23, paras. 29–30.

223 *See* **Memorial Vol. II, Annex 1**, UAE Ministry of Foreign Affairs, *UAE supports statements of Kingdom of Bahrain and Kingdom of Saudi Arabia on Qatar* (5 June 2017) (referencing the "brotherly Qatari people").

224 **Memorial Vol. VI, Annex 162**, Expert Report of Dr. J.E. Peterson, p. 22, para. 29.

> *who is not extends well beyond formal citizenship*."[225]

2.122 The development of a Qatari identity distinct from formal legal citizenship—the concept of "who is Qatari" in the historical-cultural sense—predates the formation of Qatar as a nation-State. "[B]elonging to the Qatari proto-State grew out of shared (including presumed or adopted) genealogical origins . . . as well as a shared pattern of occupation of contiguous territory encompassing the Qatari peninsula."[226]

2.123 Individuals of Qatari national origin are distinct and easily identifiable by other Gulf residents, including based on their uniquely Qatari dialect and dress, or by their family affiliations[227]. As detailed in Qatar's Memorial, for example, one Qatari declarant explained that "the traditional Qatari dress . . . is very distinct from the other GCC States so the fact that I am Qatari [is] easily recognizable"[228]. Other Qataris have explained that their accent easily identifies them as Qataris, so much so that one declarant stated that to avoid being targeted in the UAE after

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225 **Memorial Vol. VI, Annex 162**, Expert Report of Dr. J.E. Peterson, pp. 4–5, para. 2 (emphasis added).

226 **Memorial Vol. VI, Annex 162**, Expert Report of Dr. J.E. Peterson, p. 14, para. 16; *see also ibid.*, p. 22, para. 29 ("[C]urrent conceptions of 'Qatari' identity can and do include: myths of origin (in terms of shared heritage or descent, long-standing residence in what is now Qatar, meritorious service to rulers); . . . living memory and passed-down memories of existence in Qatar, commingling with other similar families or groups; shared characteristics (ethnocracy); and, most recently, loyalty and allegiance to the Qatari State").

227 Qatar Memorial, pp. 130–131, paras. 3.94–3.95.

228 Qatar Memorial, p. 130, para. 3.94; **Memorial Vol. VII, Annex 177**, DCL-024, para. 10.

5 June, "[w]hen out in public, I would change my accent so that people would not realize I was Qatari"[229].

2.124 *Second*, it is unquestionable that the UAE's Discriminatory Measures have had a disparate impact on individuals of Qatari origin in this historical-cultural sense—even under the UAE's more limited definition of "national origin". As Qatar demonstrated in its Memorial, including through documentary evidence and witness statements, the vast majority of the individuals affected by the UAE's Discriminatory Measures fall into the category of individuals that the UAE itself admits are of Qatari national origin: they are Qataris, born in Qatar to Qatari parents[230]. Indeed, the vast majority of Qatari citizens, a population the UAE concedes was affected by its Measures, fall within the UAE's definition of "national origin". Statistical evidence provided by the Director of the Department of Nationality and Travel within Qatar's Ministry of Interior demonstrates that fully 87.39% of Qatari citizens today were born in Qatar—and this number does not include individuals of Qatari origin by virtue of their parentage who happened to be born outside the country[231]. This fact is mirrored in the claims submitted to the Compensation Claims Committee ("***CCC***"): Of the complaints verified by the

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229 Qatar Memorial, pp. 130–131, para. 3.95; **Memorial Vol. VII, Annex 180**, DCL-028, para. 20.

230 *See* Qatar Memorial, p. 15, para. 1.36.

231 **Vol. II, Annex 1**, Letter from Abdullah Saad Al-Buainain, Director of the Department of Nationality and Travel Documents, Qatar Ministry of Interior, to the Director of Public Security, *Statistics of Qataris Born in the State of Qatar and Abroad* (15 July 2019).

CCC, 91% of the individual complainants were born in Qatar and 84% were born to parents who were also both born in Qatar[232].

2.125 Further, the Discriminatory Measures also impact individuals who do not have Qatari present nationality but who possess Qatari heritage. For example, children of Emirati nationality who possess Qatari heritage by virtue of their Qatari mothers have suffered painful family separations as a result of the Discriminatory Measures[233]. Moreover, the UAE's State-sponsored Anti-Qatari Incitement Campaign has fostered a virulent wave of anti-Qatari sentiment that is incapable of distinguishing between persons with Qatari heritage based on whether or not they possess a Qatari passport[234]. Indeed, even non-Qatari nationals have reported discriminatory treatment by UAE officials simply because of an association with characteristics of that identity or heritage, for example, that they were born in Qatar or wore traditional Qatari garb[235].

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232 **Memorial Vol. XII, Annex 272**, Affidavit, State of Qatar Compensation Claims Committee, Exhibit B; *see also* **Vol. II, Annex 272-A**, Affidavit, State of Qatar Compensation Claims Committee, Exhibit A (updated to reflect information received after the submission of the Memorial). Specifically, of the 975 complaints verified by the CCC, a total of 891 (91%) of the individual complainants were born in Qatar. Of those 891 individuals, 815 (84%) were born to parents who were also both born in Qatar. Both sets of data were unavailable for 51 individuals.

233 **Memorial Vol. VIII, Annex 186**, DCL-037.

234 Qatar Memorial, Chap. II, Sec. II.C; *see, e.g., ibid.*, p. 339, para. 5.178 (describing statements of hundreds of private individuals expressing anti-Qatari sentiment, such as "The Qatari is like a pig or a swine (wild boar). The pig is distinguished from other animals by the fact that it is a cuckold and lacks virility. . . . The Qatari does not have any manhood or masculinity. . . . There are not enough men in Qatar, so its government imports men for them from Turkey and Iran to protect their wives and families.").

235 Qatar Memorial, p. 140, para. 3.111, n.351; **Memorial Vol. IX, Annex 210**, DCL-084, p. 5–6, paras. 5, 8 (non-Qatari national stating, "[T]he customs official . . . looked at my passport,

2.126 Accordingly, while the UAE's definition of "national origin" is an unduly narrow one essentially restricting application of the term to an individual's place of birth and parentage, even that definition clearly encompasses the historical-cultural community of Qataris disproportionately impacted by the UAE's Discriminatory Measures, rendering them within the CERD's scope on that basis alone.

2.127 *Finally*, the question of discrimination is not determined based on the UAE's purported purpose alone. The impact of the UAE's conduct on such Qataris is far from "coincidence"[236], as the UAE calls it, but rather intentional and purposeful targeting[237]. The UAE knew at the time it took its actions that Qatari nationality (in the sense of present citizenship), much like nationality in the UAE itself and in other Gulf countries, almost entirely coincides with individuals who can trace their birth or the birth of their ancestors to Qatar and its historical

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and he commented on the fact that I was born in Qatar . . . . It is because I was born in Qatar that they take me for interrogation in the security office."); **Memorial Vol. IX, Annex 223**, DCL-107, para. 10 (non-Qatari national, stating, "The immigration officer . . . told me that I was 'not welcome' in the UAE. I understood him to mean that Qataris were not welcome—and that he knew I am Qatari because I was dressed in the traditional Qatari thobe.").

236 UAE Preliminary Objections, p. 42, para 76.

237 While an objective examination of the purpose of the UAE's measures is a matter for the merits, Qatar notes that, once there is evidence that a State has discriminated against a protected group, human rights law imposes a "heavy burden" on that State to establish the legitimacy of its actions. *See* Human Rights Committee, *Muller and Engelhard v. Namibia*. Communication No. 919/2000 (26 March 2002), para. 6.7 ("A different treatment based on one of the specific grounds enumerated in article 26, clause 2 . . . places a heavy burden on the State party to explain the reason for the differentiation"); *see also* Human Rights Committee, *Karnel Singh Bhinder v. Canada*, Communication No. 208/1986 (9 June 1989), paras. 6.1–6.2; European Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Art. 4 ("[I]t shall be for the respondent to prove that there has been no breach of the principle of equal treatment."); European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art. 8 (same).

territory—in other words, individuals who also possess Qatari "national origin" in the historical-cultural sense.

2.128 As the UAE is well aware, this overlap is the natural result of Qatar's nationality law, which defines a "Qatari" for citizenship purposes in a restrictive manner, meaning that individuals who can trace their birthplace and origins, or those of their ancestors, to Qatar, constitute "the great majority of Qatari citizens today"[238]. This is the case not only in Qatar, but in the UAE itself and other Gulf States more generally, where present nationality in the legal sense is deeply intertwined with heritage, parentage, history, and culture[239]. Thus, while the UAE now argues that it targeted Qataris on the basis of present nationality only, the more plausible explanation is that the UAE targeted those with Qatari identity—and thus origin, as much as nationality, using one as a proxy for the other.

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[238] **Memorial Vol. VI, Annex 162**, Expert Report of Dr. J.E. Peterson, p. 19, para. 24. Qatari law defines as a Qatari citizen anyone normally resident in Qatar during the period of 1930 to 1961 (a period which pre-dates the formation of the State of Qatar) and their descendants. While Qatar's nationality law also provides a pathway to naturalization for individuals not meeting these criteria, the conditions for naturalization are relatively restrictive, and under Qatari law limited to only 50 individuals per year. Qatar Memorial, p. 136, para. 3.102; **Memorial Vol. II, Annex 69**, Qatar Law No. 38 of 2005 on the acquisition of Qatari nationality 38/2005 (30 October 2005), Arts. 2, 4, 5, 8; **Memorial Vol. VI, Annex 162**, Expert Report of Dr. J.E. Peterson, p. 19, para. 24 ("Individual naturalization is stated in the law to be limited to 50 individuals per year (although the Amir retains the right to naturalize others)".). The UAE's restrictive citizenship laws are similar. **Memorial Vol. II, Annex 37**, United Arab Emirates: Federal Law No. (17) of 1972 on Citizenship and Passports (18 November 1972), Arts. 5–10 (describing limited categories of individuals who may be granted UAE citizenship).

[239] *See* **Memorial Vol. VI, Annex 162**, Expert Report of Dr. J.E. Peterson, pp. 18–20, paras. 24–26; **Memorial Vol. II, Annex 37**, United Arab Emirates: Federal Law No. (17) of 1972 on Citizenship and Passports (18 November 1972).

2.129 Further, as described in detail in Qatar's Memorial, the UAE has made no secret that the purpose of its Measures is to punish and undermine Qatar and those associated with it[240]. The discriminatory animus underlying its acts, which has been directed at persons perceived as possessing Qatari identity rather than any sense of citizenship[241], belies the UAE's contentions that its sole objective is to "differentiate" on the basis of citizenship. In trying to punish Qatar, it is individual members of the Qatari community—persons of Qatari identity—that are the primary targets. As a result, the UAE's attempt to argue that the Discriminatory Measures affect "exclusively citizens of Qatar"[242] is disingenuous, at best. And indeed, the UAE itself recognizes that this sort of targeting by proxy, or what it calls "disguised racial discrimination"—even if framed in terms of "current nationality"—would be improper under the CERD[243].

2.130 In short, the evidence makes clear that even if "national origin" were interpreted to exclude nationality, which it should not be, the UAE *has no basis* to argue that the Discriminatory Measures' disparate impact on these individuals—one engineered and indeed intended by the UAE—falls outside the scope of the CERD's protections. In other words, the Court has jurisdiction *ratione materiae* even if it adopts the UAE's proposed restrictive definition of "national origin".

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240 Qatar Memorial, pp. 4–5, paras. 1.8–1.9.

241 *See* paras. 2.83, 2.125, above; Qatar Memorial, p. 126, para. 3.88; *ibid.*, Chap. V, Sec. IV.

242 UAE Preliminary Objections, p. 36, para. 63.

243 *See* UAE Preliminary Objections, p. 72, para. 133 (arguing that "[t]he Committee's aim [in enacting GR 30] was obviously to make clear that differential treatment on the basis of citizenship or immigration status is prohibited in so far as . . . the criteria used are a vehicle for disguised racial discrimination as defined in the CERD" and that "[t]he UAE, however, did not hide behind non-citizenship in order to racially discriminate (as defined in the CERD) against Qataris").

Indeed, to hold otherwise would require the Court to come to the unsustainable conclusion that the Qatari people are incapable of possessing a unique national origin tied to Qatar as their country of birth, or to effectively read "national origin" out of the CERD.

2.131 To the extent that the UAE disputes the existence, nature and contours of Qatari national origin, or that the measures have *in fact* impacted upon the fundamental human rights of individuals with Qatari origin contrary to the CERD, that is a matter for the merits phase, which the Court need not definitively decide in order to determine that Qatar has made a sufficient showing that its dispute with the UAE is "*capable* of falling" within the scope of the CERD[244]. Even if the Court decided to consider those issues, the UAE's first objection would lose its

[244] *See Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, 6 June 2018*, para. 69 (assessing whether a claim is "capable of falling within the provisions of the [applicable instrument] and whether, as a consequence, it is one which the Court has jurisdiction to entertain"); *see also Oil Platforms (Iran v. United States), Preliminary Objections, Judgment, I.C.J. Reports 1996*, para. 51 (concluding that "[o]n the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil; it notes nonetheless that their destruction was capable of having such an effect, and consequently, of having an adverse effect upon the freedom of commerce as guaranteed by [the relevant treaty]" and thus upholding jurisdiction). This is a legal assessment made on the basis of the facts as presented by Qatar. *See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427 ("[T]here can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, *and on the basis of the facts there asserted*, there is a dispute between the Parties, *inter alia*, as to the 'interpretation or application' of the Treaty") (emphasis added); *Oil Platforms (Iran v. United States), Preliminary Objections, Judgment, I.C.J. Reports 1996*, para. 16 (noting that the Court "must ascertain whether the violations of the Treaty of 1955 *pleaded by Iran* do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain") (emphasis added).

"exclusively preliminary character", and thus would equally be a matter for the merits phase[245].

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2.132 In conclusion, the UAE's First Preliminary Objection fails for at least two reasons: *first*, the UAE misinterprets "national origin" as the term is used in Article 1(1) of the CERD, and further ignores the CERD's object and purpose as well as its protective and evolutive character, by arguing that nationality-based discrimination is excluded from the Convention's protections. The CERD's drafting history, as well as the circumstances of its conclusion, confirm that the term "national origin" encompasses present nationality, and thus that the UAE's explicit targeting of Qatari nationals for discriminatory treatment falls within the scope *ratione materiae* of the CERD.

2.133 *Second*, in setting forth its Objection, the UAE ignores entirely that the CERD is not limited to the facially stated target of a particular measure, but prohibits discrimination in both purpose and effect, and that Qatar has submitted a substantial body of evidence demonstrating that the UAE's Discriminatory Measures in fact have had a disparate negative impact on individuals of Qatari

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[245] *See* Rules of the International Court of Justice, Art. 79, para. 9 ("After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings"); *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, para. 51 ("In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits").

national origin—in the sense of Qatari birth and heritage, which the UAE itself defines as constituting "national origin"—and that this effect is the natural consequence and indeed the intended purpose of the UAE's acts. Accordingly, the UAE's First Preliminary Objection should be rejected.

CHAPTER III
THE COURT SHOULD REJECT THE UAE'S SECOND PRELIMINARY OBJECTION TO JURISDICTION BASED ON ARTICLE 22 PRECONDITIONS AS CUMULATIVE REQUIREMENTS

3.1 The UAE's Second Preliminary Objection is that "Qatar has not fulfilled the procedural preconditions of Article 22 of the Convention"[246]. According to the UAE, Qatar "has not pursued as far as possible either negotiation or the CERD procedures", both "individually as well as . . . cumulatively"[247]. The result, in the UAE's view, is that the Court has no jurisdiction to hear Qatar's Application[248].

3.2 This objection suffers from similar defects as the First Preliminary Objection. Not only are the UAE's arguments without basis in fact or law, but they also entirely fail to take into account the arguments Qatar presented in its Memorial, including the fact that 13 Judges of the Court, including six current Judges, have expressed the view that the Article 22 preconditions are alternative, not cumulative[249].

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246 UAE Preliminary Objections, Chap. IV.

247 UAE Preliminary Objections, p. 77, para. 145.

248 UAE Preliminary Objections, p. 77, para. 145.

249 Qatar Memorial, pp. 143–144, para. 3.118 (citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, I.C.J. Reports 2008*, para. 17; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, paras. 39–47; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Dissenting Opinion of Judge Cançado Trindade, I.C.J. Reports 2011*, para. 116). Not a single judge, in either *Georgia v. Russian Federation, Ukraine v. Russian Federation*, or this case, has expressed a contrary view.

3.3 Qatar will not burden the Court by repeating here all the arguments set forth in its Memorial[250]. Rather, this Chapter responds only to the arguments the UAE raises in its Second Preliminary Objection. It therefore tracks the organization of Chapter IV of the UAE's Preliminary Objections.

3.4 Qatar first responds to Section IV.A of the Preliminary Objections and explains why Article 22 establishes alternative, not cumulative, procedural preconditions (**Section I**). Qatar then responds to Section IV.B of the Preliminary Objections and demonstrates that it has satisfied the Article 22 negotiation requirement (**Section II**)[251]. As a result, the Court has jurisdiction to entertain Qatar's Application under Article 22 of the CERD.

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250 Qatar Memorial, Chap. III, Sec. II.

251 Qatar also considers that the CERD procedures requirement in Article 22 has been met, and at a minimum, will have been met by the time the Court renders its judgment on the UAE's preliminary objections. *See, e.g., Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, para. 43 ("Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute . . . or to determine whether the dispute has disappeared as of the time when the Court makes its decision"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996*, paras. 24, 26 (deciding on a preliminary objection as of the date of the Judgment, rather than the date of the filing of the Application) (citing *Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment, 1924, P.C.I.J., Series A, No. 2*, p. 34; *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, 1926, P.C.I.J., Series A, No. 6*, p. 14). As such, even if the Court determines that the two requirements in Article 22 are cumulative, Qatar would have met them both.

Section I. Article 22 Establishes Alternative, Not Cumulative, Procedural Preconditions

3.5 In its Preliminary Objections, the UAE strains the text, context, object and purpose, and *travaux préparatoires* of Article 22 in an attempt to convince the Court that the procedural preconditions stated therein are cumulative. Notably, the UAE has abandoned three of the four arguments it advanced at the provisional measures hearing in June 2018 as to why the requirements are supposedly cumulative.

3.6 At that hearing, the UAE argued that the text of Article 22 "is the direct result of a proposal made by Mr. Ingles"[252]; compared Article 22 to compromissory clauses of other human rights treaties[253]; and sought to confirm the allegedly "successive" character of the procedural preconditions of Article 22 that the UAE claimed arose from that comparison by reference to the *Handbook on the Peaceful Settlement of Disputes between States*[254].

3.7 The UAE does not pursue any of these arguments in its Preliminary Objections. With good reason. In its Memorial, Qatar explained that Article 22 is *not* the result of Mr. Ingles's proposal[255], which the UAE now admits[256]; the compromissory clauses of other human rights treaties cited by the UAE differ

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252 CR 2018/13, p. 12, para. 8(4) (Pellet) (English translation).

253 CR 2018/13, p. 13, para. 8(6) (Pellet) (English translation).

254 CR 2018/13, p. 14, para. 8(7) (Pellet) (English translation).

255 Qatar Memorial, p. 156, para. 3.140.

256 UAE Preliminary Objections, p. 88, para. 172.

significantly from the CERD's[257]; and the *Handbook on the Peaceful Settlement of Disputes between States* cannot constitute an authoritative interpretation of Article 22[258].

3.8 The only one of its four earlier arguments that the UAE maintains is the argument based on a passage from the Court's Judgment on Preliminary Objections in *Georgia v. Russian Federation*, that it claims "make[s] it easy to assume" that the procedural preconditions of Article 22 are cumulative[259]. Qatar addresses this contention as well as the UAE's interpretive arguments below, starting with the UAE's alleged "good faith interpretation of the ordinary meaning of the terms of Article 22 of the CERD in their context"[260], and concludes this Chapter by addressing the UAE's examination of the *travaux préparatoires*[261].

A. A Good Faith Interpretation of Article 22 of the CERD Establishes the Alternative Nature of the Procedural Preconditions of Article 22

3.9 The UAE argues that a "good faith interpretation of the ordinary meaning of the terms of Article 22 of the CERD in their context" establishes that the procedural preconditions to the Court's jurisdiction set forth in that provision are

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257 Qatar Memorial, pp. 163–164, paras. 3.151–3.154; *see also* CR 2018/14, pp. 14–15, para. 20 (Martin).

258 Qatar Memorial, p. 165, para. 3.156.

259 UAE Preliminary Objections, p. 90, paras. 176–177. At the same time, the UAE admits that the Court "has not yet decided whether the two procedural preconditions in Article 22 are cumulative or alternative". *Ibid.*, p. 76, para. 143.

260 UAE Preliminary Objections, Sec. IV.A.1.

261 UAE Preliminary Objections, Sec. IV.A.2.

cumulative, not alternative[262]. The UAE's arguments fail for the reasons explained immediately below. Qatar notes at the outset, however, that the UAE's interpretative exercise is flawed in its design. It fails to take into account an equally important element of treaty interpretation: the object and purpose of the CERD[263].

3.10 That is not an accident. The UAE's arguments simply cannot be reconciled with the CERD's object and purpose. As Qatar explained in its Memorial, the object and purpose of the CERD is to eliminate racial discrimination "*without delay*"[264]. Indeed, the preamble of the CERD emphasizes "the necessity of *speedily* eliminating racial discrimination throughout the world in all its forms and manifestations"[265]. Taking account of the object and purpose of the Convention thus compels the conclusion that recourse to the Court under Article 22 should not be unnecessarily delayed, as interpreting the preconditions to be cumulative in character would entail[266]. The CERD procedures are lengthy by design: in the present case, for example, more than a year and four months have passed since Qatar submitted its communication under Article 11, and a conciliation commission has not yet even been constituted. To interpret Article 22 as requiring States to wait for negotiations *and* all of the CERD procedures to be exhausted

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262 UAE Preliminary Objections, Sec. IV.A.1.

263 Article 31(1) of the VCLT provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*." VCLT, Art. 31(1) (emphasis added).

264 CERD, Art. 2.1 (emphasis added).

265 CERD, preamble, para. 5 (emphasis added).

266 Qatar Memorial, pp. 145–148, paras. 3.121–3.123.

before seeking recourse to the Court would be contrary to the stated purpose of the treaty itself.

3.11 In any event, even taken on its own terms, the UAE's argument fails. The UAE's alleged "good faith interpretation" of Article 22 can be reduced to four discrete arguments, none of which is persuasive.

3.12 The UAE's *first* argument is that the term "or" in Article 22 "is the equivalent of 'neither . . . nor'" and as such the procedural preconditions are cumulative[267]. This argument depends on a tortured reading of paragraph 42 of the joint dissenting opinion of five Judges in the preliminary objections phase of the *Georgia v. Russian Federation* case[268]. However, the Court will recall that those Judges found that the "neither . . . nor" structure "does not . . . tell us any more about whether the two modes are alternative or cumulative"[269]. In fact, they concluded, based on other considerations, that the Article 22 preconditions are

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[267] UAE Preliminary Objections, pp. 78–79, para. 151.

[268] *See* UAE Preliminary Objections, pp. 78–79, para. 151 (citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 42). A sixth dissenting Judge, Judge Cançado Trindade concluded that "the conjunction 'or' indicates that the draftsmen of the CERD Convention clearly considered 'negotiation' or 'the procedures expressly provided for in this Convention' as *alternatives*". *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Dissenting Opinion of Cançado Trindade, I.C.J. Reports 2011*, para. 116 (emphasis in original).

[269] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 42. This sentence is conspicuously missing from the UAE's quotation from the joint dissenting opinion in paragraph 151 of its Preliminary Objections.

alternative, not cumulative[270]. The opinion thus actually undermines, rather than supports, the UAE's position.

3.13 The UAE's *second* argument, which appears at various places in its Preliminary Objections, seeks to play up the differences between negotiation and the CERD procedures. The UAE argues, for example, that Article 22 "prescribes two different means to seek a consensual resolution of a dispute before recourse may be had to the Court"[271]; that the CERD procedures "are not merely another form of direct negotiation"[272]; and that "where one may fail the other may succeed, depending on particular circumstances"[273].

3.14 Qatar does not dispute any of these points. Of course, negotiation and the CERD procedures are different dispute settlement mechanisms. But they still serve the same purpose. As the UAE acknowledges, they are "two distinct means of seeking to achieve *the same outcome*: a *consensual* resolution"[274]. Or, in the

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[270] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, paras. 39–47.

[271] UAE Preliminary Objections, pp. 79–80, para. 152; *see also ibid.*, p. 80, para. 154.

[272] UAE Preliminary Objections, p. 82, para. 160 (emphasis omitted).

[273] UAE Preliminary Objections, pp. 79–80, para. 152.

[274] UAE Preliminary Objections, p. 80, para. 154 (emphasis added).

words of the five dissenting Judges in *Georgia v. Russian Federation*, they are "two different ways of doing the same thing"[275].

3.15 Requiring a State that has already exhausted negotiations to then also exhaust the CERD procedures before seizing the Court would, in the words of the five dissenting Judges, be "illogical"[276], "senseless"[277], "highly unreasonable"[278], and "inconsistent with the spirit of the text" of the Convention[279]. *A fortiori*, where one State—in this case, the UAE—completely refuses to enter into genuine negotiations with the other State, it would be even more nonsensical to *require* the other State to proceed to invoke and exhaust the CERD procedures.

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[275] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 44; *see also* Qatar Memorial, pp. 145–147, paras. 3.121–3.122.

[276] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 43.

[277] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 43.

[278] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 44.

[279] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 43.

3.16 The UAE's *third* argument is that only a cumulative reading of the Article 22 preconditions "permits the phrase 'or by the procedures expressly provided for in this Convention' to produce an effect, in accordance with the principle of effectiveness (*effet utile*)"[280]. Not only is that not true, but it rests on the same premise as the UAE's first argument. Reading the preconditions of Article 22 as alternative would be entirely consistent with *effet utile*: an applicant State may invoke either negotiations *or* the CERD procedures.

3.17 Remarkably, just two paragraphs later, the UAE itself proves that the principle of *effet utile* actually supports Qatar's reading of Article 22. The UAE acknowledges that, as Qatar noted in its Memorial[281] and the five dissenting judges noted in *Georgia v. Russian Federation* as well[282], negotiation constitutes an "essential" element of the CERD procedures under Article 11(2) of the CERD[283]. In fact, Article 11 of the CERD expressly envisions bilateral negotiations *before* re-referral of the matter to the CERD Committee and the establishment of the conciliation process (a point the UAE itself highlights). It is reading the Article 22 preconditions as cumulative that would render the negotiation precondition redundant[284]. On the other hand, reading the two

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280 UAE Preliminary Objections, p. 80, para. 153.

281 Qatar Memorial, p. 148, para. 3.124.

282 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 43.

283 UAE Preliminary Objections, pp. 80–81, para. 155.

284 It would also deprive Article 22's reference to disputes concerning the interpretation of the CERD of *effet utile*. This is because disputes concerning the interpretation of the CERD (as well as some disputes concerning its application) do not concern whether a State Party "is not

preconditions as alternative fully preserves the effect of both—and potential for the amicable settlement of the dispute.

3.18 The UAE's *fourth* and final argument is that the CERD procedures, as an "expressly provided" and "specific and tailored mechanism to address allegations of breaches of the Convention", are "integral . . . to States Parties' consent to the Court's jurisdiction"[285]. That may be true, but Qatar does not see how it supports the UAE's argument. The CERD procedures are only integral to the extent that they constitute one of two alternative requirements to the Court's jurisdiction. It might be different had recourse to the CERD Committee been made mandatory under Article 11 of the CERD—but it was not. Article 11(1) provides that a State Party "may" (not "shall") invoke this procedure if it wishes to do so[286].

3.19 For these reasons, and the additional reasons set out in Qatar's Memorial, the UAE's alleged "good faith interpretation" of Article 22 of the CERD is unpersuasive. The procedural preconditions of Article 22 are alternative, not cumulative.

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giving effect to the provisions of [the CERD]" and thus may not be submitted to the CERD Committee under Article 11(1). *See* Qatar Memorial, p. 149, para. 3.125.

[285] UAE Preliminary Objections, pp. 81–82, paras. 157–158 (emphasis omitted); *see also ibid.*, p. 82, para. 159.

[286] CERD, Art. 11(1).

B. THE *TRAVAUX PRÉPARATOIRES* CONFIRM THE ALTERNATIVE NATURE OF THE ARTICLE 22 PRECONDITIONS

3.20 The meaning of Article 22 is clear: the preconditions are alternative. There is therefore no need to consult the *travaux préparatoires*. Yet, even if there were, the *travaux préparatoires* only confirm the same conclusion.

3.21 In its Preliminary Objections, the UAE first discusses the *travaux* of Part II of the Convention[287], which provides for, *inter alia*, the establishment of the CERD Committee and its functions, and then discusses the *travaux* of Article 22 itself[288], which falls within Part III of the Convention. Qatar will address the two subjects in the same order.

1. The Travaux Préparatoires *of Part II*

3.22 As the UAE's Preliminary Objections do not take account of Qatar's Memorial, it is worth noting the points of agreement between the Parties on the *travaux* of Part II of the Convention, including the CERD procedures.

3.23 First, the Parties agree that the text of Part II of the Convention dealing with the resolution of inter-State complaints had its origins in Mr. Ingles's "proposed measures of implementation"[289]. Both Parties also note that Article 17 of these proposed measures reads as follows:

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[287] UAE Preliminary Objections, pp. 86–88, paras. 167–171.

[288] UAE Preliminary Objections, pp. 88–90, paras. 172–177.

[289] Qatar Memorial, pp. 155–156, para. 3.139–3.140; UAE Preliminary Objections, p. 86, para. 167.

> "The States Parties to this Convention agree that any State Party complained of or lodging a complaint may, if no solution has been reached within the terms of article 14, paragraph 1,[290] bring the case before the International Court of Justice after the report provided for in article 14, paragraph 3,[291] has been drawn up."[292]

3.24 Where the Parties differ is in the interpretation of Article 17. It is true that Article 17 provided that States Parties could have recourse to the Court after the report of the Committee had been drawn up. The UAE mistakenly takes this to

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290 Article 14, paragraph 1, provided: "Subject to the provisions of article 12, the Committee, after obtaining all the information it thinks necessary, shall ascertain the facts, and make available its good offices to the States concerned with a view to an amicable solution of the matter on the basis of respect for the Convention." **Memorial Vol. III, Annex 71**, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Mr. Ingles: Proposed Measures of Implementation, Sixteenth Session*, document E/CN.4/Sub.2/L.321 (17 January 1964), p. 5.

291 Article 14, paragraph 3, provided in relevant part: "If a solution within the terms of paragraph 1 of this article is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached. If such a solution is not reached, the Committee shall draw up a report on the facts and indicate the recommendations which it made with a view to conciliation." **Memorial Vol. III, Annex 71**, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Mr. Ingles: Proposed Measures of Implementation, Sixteenth Session*, document E/CN.4/Sub.2/L.321 (17 January 1964), p. 5.

292 Qatar Memorial, p. 157, para. 3.142; UAE Preliminary Objections, p. 87, para. 169. The UAE does not present this text in full, but cites to the same document that Qatar cites to. Qatar Memorial, p. 157, para. 3.142, n.399; UAE Preliminary Objections, p. 87, para. 169, n.302.

mean that this is the only case in which recourse to the Court could be had[293], but that was not the case.

3.25 Indeed, as Qatar noted in its Memorial[294], the very next article of Mr. Ingles's "proposed measures of implementation", Article 18, provided that States Parties could have *direct* recourse to the Court for disputes arising out of the interpretation or application of the Convention:

> "The provisions of this Convention *shall not prevent* the State Parties to the Convention from submitting to the International Court of Justice any dispute arising out of the interpretation or application of the Convention in a matter within the competence of the Committee . . ."[295]

3.26 The UAE conveniently ignores Article 18. It does, however, quote the following excerpt from the official summary record of Mr. Ingles's explanation of his "proposed measures of implementation":

> "Under the proposed procedure, States Parties to the convention should first refer complaints of failure to comply with that instrument to the State party concerned; it is only when they are not satisfied

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293 UAE Preliminary Objections, p. 87, para. 169 ("Draft Article 17 of Mr. Ingles'[s] proposal prescribed recourse to the Court *only in the event that* no prior solution had been reached between the States Parties with the help of the Conciliation Commission.") (emphasis added).

294 Qatar Memorial, p. 158, para. 3.143.

295 **Memorial, Vol. III, Annex 71**, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Mr. Ingles: Proposed Measures of Implementation, Sixteenth Session*, document E/CN.4/Sub.2/L.321 (17 January 1964), p. 6 (emphasis added).

> with the explanation of the State party concerned that they may refer their complaint to the Committee. *Direct appeal to the International Court of Justice,* provided for in both the Covenants on Human Rights and the UNESCO Protocol, *was also envisaged in his draft.*"[296]

3.27 The italicized sentence is a clear reference to Article 18. There is thus no question that Mr. Ingles's proposal envisaged that States Parties could, in addition to having recourse to the Court after the Committee's report was drawn up under Article 17, also have "direct appeal" to the Court under Article 18.

3.28 The only support the UAE presents for its interpretation of Article 17 is found in another excerpt from the record of Mr. Ingles's explanation[297], and explanations by the delegations of the Philippines[298] and the Netherlands[299]. All

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[296] UAE Preliminary Objections, p. 86, para. 167 (quoting **UAE Preliminary Objections, Vol. III, Annex 31**, *Sub-Commission on Prevention of Discrimination and Protection of Minorities, 427th meeting*, 12 February 1964, document E/CN.4/Sub.2/SR.427) (emphasis added). It may be recalled that at the first provisional measures hearing, the UAE also quoted this text, but concealed the sentence on "direct appeal" with an ellipsis. *See* CR 2018/13, p. 20, para. 8(4) (Pellet); Qatar Memorial, p. 159, para. 3.145.

[297] UAE Preliminary Objections, pp. 86–87, para. 168 (quoting **UAE Preliminary Objections, Vol. III, Annex 31**, *Sub-Commission on Prevention of Discrimination and Protection of Minorities, 427th meeting*, 12 February 1964, document E/CN.4/Sub.2/SR.427) ("If the Committee failed to effect conciliation within the time allotted, either of the parties may take the dispute to the International Court of Justice.").

[298] UAE Preliminary Objections, p. 87, para. 170 (quoting **UAE Preliminary Objections, Vol. III, Annex 44**, *Third Committee, 1344th meeting*, 16 November 1965, A/C.3/SR.1344) ("If a solution could not be reached, the committee would draw up a report on the facts and indicate its recommendations. Eventually the States Parties could bring the case before the International Court of Justice.").

[299] UAE Preliminary Objections, pp. 87–88, para. 171 (quoting **UAE Preliminary Objections, Vol. III, Annex 44**, *Third Committee, 1344th meeting*, 16 November 1965, A/C.3/SR.1344) ("[I]f a matter was not adjusted to the satisfaction of both the complaining State and the State complained against, either by bilateral negotiations or by any other procedure open to them,

three of these sources, however, only re-state the contents of Article 17: States Parties could have recourse to the Court *after* recourse to the Committee. None of them stands for the proposition that the UAE seeks to establish; namely, that States Parties could approach the Court *only after* having recourse to the Committee.

2. The Travaux Préparatoires *of Article 22*

3.29 Turning to the *travaux* of Article 22 of the CERD itself, it is again worth summarizing the points of agreement between the Parties.

3.30 As previously stated, the Parties now agree that Article 22 directly resulted *not* from Mr. Ingles's proposal, as the UAE previously contended[300], but rather from a proposal by the Officers of the Third Committee of the General Assembly[301]. The Parties also agree that the proposal made by the Officers of the Third Committee, labeled "Clause VIII", provided as follows:

> "Any dispute between two or more Contracting States over the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any of the parties to the

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either State should have the right to refer the matter to a committee . . . . *Under that system*, the case might be referred to the International Court of Justice as a last resort." (emphasis added above, emphasis omitted below)).

300 CR 2018/13, p. 20, para. 8(4) (Pellet); *see* Qatar Memorial, p. 156, para. 3.140.

301 Qatar Memorial, p. 151, para. 3.131 (quoting **Memorial Vol. III, Annex 82**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, document A/C.3/L.1237 (15 October 1965)); UAE Preliminary Objections, p. 88, para. 172. This proposal resulted in turn from a list of options presented by the Secretary-General. Qatar Memorial, pp. 150–151, paras. 3.128-3.131.

> dispute be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[302]

3.31 The Parties further agree that, just three weeks before the adoption of the Convention, Ghana, Mauritius, and the Philippines proposed an amendment (known as the "three-Power amendment") to Clause VIII by inserting the words "or by the procedures expressly provided for in this Convention"[303], which was unanimously adopted[304]. Finally, the Parties agree that the debate on the three-Power amendment occurred during the 1367th meeting of the Third Committee[305].

3.32 Where the Parties disagree is on the conclusion to be drawn from this debate. According to the UAE, the amendment "specifically sought" to "further condition[] recourse to the Court"[306]. It did no such thing. Reading the official records of the debate relevant to Chapter VIII yields the following observations.

3.33 *First*, it may be recalled that, in addition to the three-Power amendment, the Third Committee was considering an amendment submitted by the Polish delegation. The Polish amendment had proposed that the phrase "at the request of

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302 Qatar Memorial, p. 151, para. 3.131; UAE Preliminary Objections, p. 88, para. 172.

303 Qatar Memorial, p. 152, para. 3.133; UAE Preliminary Objections, pp. 88–89, para. 173.

304 Qatar Memorial, p. 152, para. 3.134; UAE Preliminary Objections, p. 89, para. 174.

305 Both Qatar and the UAE only cite to remarks made during this meeting when discussing the *travaux* of the amendment. Qatar Memorial, p. 152, para. 3.134; UAE Preliminary Objections, p. 89, para. 174.

306 UAE Preliminary Objections, pp. 88–89, para. 173.

any of the parties" be changed to "at the request of *all* of the parties"[307], which would have required both parties to a dispute to specifically consent to the Court's jurisdiction. Almost all of the debate over Clause VIII concerned the Polish amendment, not the three-Power amendment. In the end, the delegates voted to reject the Polish amendment, which shows that they did not want to make recourse to the Court more difficult by imposing additional impediments.

3.34 *Second*, in stark contrast to the debate over the Polish amendment, the discussion over the three-Power amendment was minimal. Six delegates commented on the amendment (Canada[308], Ghana[309], Colombia[310], France[311], Italy[312], and Belgium[313]), and all of the comments were brief, general expressions

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307 **Memorial, Vol. III, Annex 85**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Poland: amendments to the suggestions for final clauses submitted by the Officers of the Third Committee*, document A/C.3/L.1272 (1 November 1965), p. 2 (emphasis added).

308 **Memorial, Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, 1367th Meeting, document A/C.3/SR.1367 (7 December 1965), p. 453, para. 26.

309 **Memorial, Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, 1367th Meeting, document A/C.3/SR.1367 (7 December 1965), p. 453, para. 29.

310 **Memorial, Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, 1367th Meeting, document A/C.3/SR.1367 (7 December 1965), p. 453, para. 31.

311 **Memorial, Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, 1367th Meeting, document A/C.3/SR.1367 (7 December 1965), p. 454, para. 38.

312 **Memorial, Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, 1367th Meeting, document A/C.3/SR.1367 (7 December 1965), p. 454, para. 39.

of support. There was no significant debate over the meaning or implications of the amendment, which strongly suggests that States did not understand it to introduce any significant changes to Clause VIII[314]. And in light of their attitudes towards the Polish amendment, they most certainly did not understand the three-Power amendment to further hamper recourse to the Court.

3.35 It is possible that some delegates considered that Clause VIII did not impose *any* preconditions to jurisdiction[315]. For those delegates, merely adding a reference to the CERD procedures would have had literally no impact on recourse to the Court. For those delegates who may have understood Clause VIII to impose a negotiation precondition, they must not have considered the CERD procedures to be an additional precondition restricting access to the Court. Otherwise, they would have protested, just as many States did with the Polish amendment.

3.36 In its Preliminary Objections, the UAE ignores this context, and instead selectively quotes from the statements of just four States (Ghana, France,

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313 **Memorial, Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, 1367th Meeting, document A/C.3/SR.1367 (7 December 1965), p. 454, para. 40.

314 *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 47.

315 This could explain why there was no controversy over the three-Power amendment, as opposed to the Polish amendment. It would also explain Ghana's statement that "[t]he amendment *simply* referred to the procedures provided for in the Convention" (emphasis added). **Memorial Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, 1367th Meeting, document A/C.3/SR.1367 (7 December 1965), p. 453, para. 29. And it would furthermore explain Belgium's statement that the three-Power amendment was merely a "clarification". *Ibid.*, p. 454, para. 40.

Belgium, Italy) during the meeting[316]. But even those selective quotations are of no assistance to the UAE, as none of these States actually expressed a view on whether the two preconditions are cumulative or alternative.

3.37 The UAE first quotes from the submission of the Ghanaian delegate, who stated: "[p]rovision had been made in the draft Convention for machinery which should be used in the settlement of disputes before recourse was had to the International Court of Justice."[317] This, however, says nothing on the relationship between this "machinery" and negotiation, *i.e.*, whether these two requirements were cumulative or alternative.

3.38 The UAE next quotes from a statement by the French delegate, who said: "[h]is delegation would support the three-Power amendment since it brought [Article 22] into line with provisions already adopted in the matter of implementation."[318] As discussed above, however, the provisions previously adopted "in the matter of implementation" made clear that States could have direct recourse to the Court without going through the CERD procedures[319]. It is more

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316 UAE Preliminary Objections, p. 89, para. 174.

317 UAE Preliminary Objections, p. 89, para. 174 (quoting **Memorial Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, document A/C.3/SR.1367 (7 December 1965), p. 453, para. 29).

318 UAE Preliminary Objections, p. 89, para. 174 (quoting **Memorial Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, document A/C.3/SR.1367 (7 December 1965), p. 454, para. 38).

319 **Memorial, Vol. III, Annex 71**, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Sixteenth Session, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Mr. Ingles: Proposed Measures of Implementation*, document E/CN.4/Sub.2/L.321 (17 January 1964), p. 6.

likely, therefore, that the French delegate understood the Article 22 preconditions as alternative, not cumulative.

3.39 The UAE next quotes from a statement by the Belgian delegate noting that the amendment "introduced a useful clarification"[320]. But there is no indication whatsoever that the Belgian delegate understood this "clarification" to be that the CERD procedures are an additional precondition on top of negotiation.

3.40 Finally, the UAE quotes from a statement by the Italian delegate, who called the amendment "a useful addition"[321]. But the Italian delegate did not clarify whether he considered this "addition" to be an additional precondition on top of negotiations, or an additional option for settling disputes relating to the interpretation or application of the Convention.

3.41 The UAE finally relies on the following quotation from the Court's Judgment on Preliminary Objections in *Georgia v. Russian Federation*:

> "[A]t the time when CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States. . . . [I]t is reasonable to assume that additional limitations to resort to judicial settlement in the form of prior negotiations and other settlement procedures without fixed time-

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320 UAE Preliminary Objections, p. 89, para. 174 (quoting **Memorial Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, document A/C.3/SR.1367 (7 December 1965), p. 454, para. 40).

321 UAE Preliminary Objections, p. 89, para. 174 (quoting **Memorial Vol. III, Annex 90**, United Nations, *Official Records of the General Assembly*, Twentieth Session, Third Committee, document A/C.3/SR.1367 (7 December 1965), p. 454, para. 39).

> limits were provided for with a view to facilitating wider acceptance of CERD by States."[322]

3.42 As Qatar noted in its Memorial[323], however, the quotation shows only that the ten-Judge majority considered the Article 22 requirements to be preconditions to access to the Court's jurisdiction; it does not say anything about whether the requirements are cumulative or alternative. The majority expressly reserved its opinion on that question[324]. That said, five of the ten Judges who made up the majority had *also* signed on to the joint dissenting opinion at the provisional measures stage, which expressed the view that the CERD procedures requirement was an "*alternative* precondition"[325]. The Court's statement therefore does *not* "make it easy to assume" that the intention of the delegates was to impose cumulative preconditions to the jurisdiction of the Court, as the UAE suggests[326]. Nor is there any basis for the UAE to assume that the drafters intended to "strengthen the role" of negotiations and other settlement procedures in CERD

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322 UAE Preliminary Objections, pp. 89–90, para. 175 (quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, para. 147).

323 Qatar Memorial, p. 162, para. 3.150.

324 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, para. 183 ("[C]onsidering the factual finding that neither of these two modes of dispute settlement was attempted by Georgia, the Court does not need to examine whether the two preconditions are cumulative or alternative").

325 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, I.C.J. Reports 2008*, para. 17 (emphasis added). The five judges from this joint dissenting opinion who were in the majority at the preliminary objections stage were Judges Tomka, Koroma, Al-Khasawneh, Bennouna, and Skotnikov.

326 UAE Preliminary Objections, pp. 89–90, paras. 175–176.

disputes, rather than to clarify, for the benefit of States hesitant to submit to the compulsory settlement of disputes by the Court, that these avenues of amicable settlement existed.

3.43 Moreover, unlike the ten-Judge majority, the five joint dissenting Judges at the preliminary objections stage in *Georgia v. Russian Federation* analyzed the *travaux* for the purpose of determining whether the Article 22 requirements are cumulative or alternative, and they reached the latter conclusion. They wrote:

> "The clear impression . . . . emerges that the three Powers' intent in proposing their amendment was not to impose a further condition resulting in more limited access to the Court than under the earlier text. *There is nothing to indicate that the amendment was aimed at making resort to the special procedures under Part II mandatory where direct negotiations had failed*. More likely, the amendment was intended to make clear that recourse to these special procedures figured among the possible avenues for negotiated settlement. That is why it was regarded by the delegates as merely a 'useful addition or clarification' and was easily adopted, not as a change in the text to make it more restrictive but as a natural, and almost self-evident, clarification."[327]

3.44 The *travaux* thus confirm that the Article 22 preconditions were intended to be alternative, not cumulative.

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[327] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011*, para. 47 (emphasis added).

Section II. The Negotiation Precondition Has Been Satisfied

3.45 In its Memorial, Qatar explained in detail the legal standard governing the negotiation precondition, and how it was satisfied in the present case[328]. Qatar will not repeat all of its arguments here, but instead will summarize the three ways in which the negotiation precondition was satisfied, and rebut the arguments posed by the UAE in its Preliminary Objections.

3.46 *First*, Qatar's attempts to negotiate were made in the face of an "immediate and total refusal" to negotiate on the part of the UAE[329]. As explained in Qatar's Memorial[330], this was made clear, *inter alia*, by the statements by the UAE's Minister of State for Foreign Affairs that there was "nothing to negotiate"[331] and that the UAE's demands were "non-negotiable"[332]. The UAE in its Preliminary Objections does not even begin to explain how its bold assertion that Qatar "has not made a genuine attempt to negotiate with the UAE in respect

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328 Qatar Memorial, pp. 165–181, paras. 3.158–3.191.

329 Qatar Memorial, pp. 166–173, paras. 3.160–3.163, 3.167–3.174.

330 *See* Qatar Memorial, pp. 169–173, paras. 3.166–3.174.

331 Qatar Memorial, pp. 170–171, para. 3.169 (quoting **Vol. II, Annex 16**, J. Gambrell, "Emirati diplomat to AP: 'Nothing to negotiate' with Qatar", *Associated Press* (7 June 2017), https://apnews.com/3a69bad153e24102a4dd23a6111613ab).

332 Qatar Memorial, p. 172, para. 3.171 (quoting **Vol. II, Annex 17**, "Qatar condemns Saudi refusal to negotiate over demands", *BBC* (28 June 2017), https://www.bbc.com/news/world-middle-east-40428947); Qatar Memorial, p. 173, para. 3.173 (quoting **Vol. II, Annex 18**, N. Al Wasmi, "UAE and Saudi put pressure on Qatar ahead of demands deadline", *The National* (28 June 2017), https://www.thenational.ae/world/uae-and-saudi-put-pressure-on-qatar-ahead-of-demands-deadline-1.92119).

of a dispute regarding the Convention"[333] can be reconciled with this undisputed fact.

3.47 *Second*, even assuming that the UAE were open to negotiation (*quod non*), the negotiation precondition was satisfied because Qatar made many "genuine attempt[s]" to negotiate "with a view to resolving the dispute", as required by the Court in the *Georgia v. Russian Federation* case[334], only to see them rebuffed at every turn[335].

3.48 The UAE's response is twofold. It claims that (a) Qatar's attempts to negotiate prior to 8 March 2018, the date of its Communication addressed to the CERD Committee, do not qualify as "negotiations" because they were "at best unilateral accusations made by Qatar, followed by rebuttals of the UAE and other States in the region", and did not "mention[] a dispute concerning the interpretation or application of the CERD or even racial discrimination"[336]; and (b) Qatar's 25 April 2018 letter was only a "self-serving attempt to fulfil on paper—but without genuine intent—the negotiation precondition of Article 22 of the CERD"[337]. Both assertions are wrong.

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333 UAE Preliminary Objections, p. 91, para. 179.

334 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, para. 157.

335 Qatar Memorial, pp. 165–181, paras. 3.158–3.191.

336 UAE Preliminary Objections, p. 93, paras. 183–185.

337 UAE Preliminary Objections, p. 113, para. 228.

3.49 To begin with Qatar's attempts to negotiate prior to 8 March 2018, one example, which the Preliminary Objections completely fail to acknowledge, is sufficient to disprove their characterization by the UAE. As stated in Qatar's Memorial[338], in December 2017, the annual GCC Summit took place in Kuwait. Qatar viewed this summit as a "golden opportunity" to negotiate with the UAE[339], particularly since GCC members typically send their Heads of State or Government. Contrary to the UAE's assertion that there was no mention of the present dispute, the Qatari Foreign Minister expressly noted in the context of the Summit the "bad humanitarian situation . . . such as separation of families"[340], the same subject matter that is now before the Court in the present dispute. Nevertheless, as recounted in Qatar's Memorial[341], even though the Heads of State of Qatar and Kuwait attended, neither the UAE nor any of the other Quartet States sent their Heads of State.

3.50 Another critical example of Qatar's attempt to negotiate with a view to resolving the present dispute is the exchange between the Parties during the 37th session of the United Nations Human Rights Council. At that session, as the Court noted in its Order of 23 July 2018:

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338 Qatar Memorial, pp. 176–177, paras. 3.180–3.181.

339 **Memorial Vol. II, Annex 65**, Qatar Ministry of Foreign Affairs, *Foreign Minister: Qatar Sees Any GCC Meeting Golden Opportunity for Civilized Dialogue* (22 October 2017), https://www.mofa.gov.qa/en/all-mofa-news/details/2017/10/22/foreign-minister-qatar-sees-any-gcc-meeting-golden-opportunity-for-civilized-dialogue.

340 **Memorial, Vol. II, Annex 65**, Qatar Ministry of Foreign Affairs, *Foreign Minister: Qatar Sees Any GCC Meeting Golden Opportunity for Civilized Dialogue* (22 October 2017), https://www.mofa.gov.qa/en/all-mofa-news/details/2017/10/22/foreign-minister-qatar-sees-any-gcc-meeting-golden-opportunity-for-civilized-dialogue.

341 Qatar Memorial, p. 177, para. 3.181.

> "[T]he Minister for Foreign Affairs of Qatar referred to 'the *violations of human rights* caused by the unjust blockade and the unilateral coercive measures imposed on [his] country that have been confirmed by the . . . report of the Office of the United Nations High Commissioner for Human Rights Technical Mission', while the UAE—along with Bahrain, Saudi Arabia and Egypt—issued a joint statement 'in response to [the] remarks' made by the Minister for Foreign Affairs of Qatar."[342]

3.51 These are only two of the many instances when Qatar asserted its openness to dialogue and negotiation with the UAE[343]. If it did so publicly and not directly to the UAE, that was only because the UAE had refused any and all direct communication with Qatar, including before any and all international fora[344]. Qatar specifically offered to negotiate with a view to resolving the present dispute—at the very least, such attempts are clearly "capable of being discerned amidst the exchanges about the wider dispute"[345], which, according to the UAE, satisfies the negotiation precondition, without more[346].

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342 *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*, para. 37 (emphasis added).

343 Qatar Memorial, pp. 173–178, paras. 3.175–3.176, 3.178, 3.180–3.183.

344 Such fora included the Human Rights Council and the UN General Assembly. *See* Qatar Memorial, pp. 175–176, paras. 3.178–3.179.

345 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Separate Opinion of Judge Greenwood, I.C.J. Reports 2011*, para. 13.

346 UAE Preliminary Objections, p. 94, para. 188.

3.52 Even among the UAE's selective excerpts of official Qatari statements that do not expressly mention the CERD or "racial discrimination"[347], many expressly mention violations of human rights, including those articulated in Article 5 of the CERD. The UAE's argument is also misplaced in that, as explained in Qatar's Memorial, a State making a genuine attempt to negotiate need not "expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court"[348].

3.53 For example, the UAE first quotes a statement by His Excellency the Minister of Foreign Affairs of Qatar, where he states that the "illegal siege . . . clearly violate[s] *international human rights laws and conventions*"[349]. The UAE next quotes from the address of His Highness the Amir of Qatar to the 72nd United Nations General Assembly, in which he stated that the UAE has violated "the *human rights conventions and agreements*, which guarantee the *human right to freedom of opinion and expression*"[350], a right that is protected in Article 5(d)(viii) of the CERD. Most prominently, the UAE later quotes from a statement by His Excellency the Minister of Foreign Affairs of Qatar to the Human Rights Council, where he urges the Council "to put an end to the *human*

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347 UAE Preliminary Objections, p. 95, para. 189.

348 *See* Qatar Memorial, p. 169, para. 3.165 (quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, para. 30).

349 UAE Preliminary Objections, p. 95, para. 189(a) (emphasis added).

350 UAE Preliminary Objections, pp. 95–96, para. 189(b) (emphasis added).

rights violations resulting from these unilateral coercive *discriminatory* measures"[351].

3.54 Therefore, even on the basis of the selective quotes excerpted by the UAE, Qatar's attempts to negotiate prior to the date of its Communication to the CERD Committee clearly referred to the subject-matter of the dispute.

3.55 The UAE's attempt to discount Qatar's 25 April 2018 letter, in which Qatar formally invited the UAE to negotiate the present dispute[352], is equally unconvincing. The UAE does not deny that it never responded to Qatar's letter, but instead dismisses the significance of Qatar's invitation by asserting that "it cannot be considered a genuine, good faith attempt to enter into negotiations" and that it is "another example of Qatar seeking to 'tick the boxes' of Article 22 of the CERD"[353]. The UAE offers no plausible justification as to why the invitation should be read in this way. Its assertions are not only groundless, but they also contravene the presumption of good faith in international law[354]. There is no evidence that Qatar was not genuine in its attempt to negotiate.

3.56 The UAE is therefore reduced to asking the Court to infer bad faith from what it calls the "highly unorthodox sequence and timing" of Qatar's actions

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351 UAE Preliminary Objections, p. 97, para. 189(f) (emphasis added).

352 **Memorial, Vol. II, Annex 68**, Request for Negotiation from the Permanent Delegation of the State of Qatar to the United Nations in Geneva to the Emirati Minister of State for Foeign Affairs (25 April 2018) (certified translation).

353 UAE Preliminary Objections, p. 112, para. 224.

354 *See Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, para. 150 (collecting cases).

under Articles 11 and 22 of the CERD[355]. Even assuming that bad faith could be supported by something less than "clear and convincing evidence which compels such a conclusion"[356], the fact remains that Qatar's actions are not at all unorthodox, all the more so given Article 22 is properly understood as establishing alternative procedural preconditions to the Court's jurisdiction.

3.57 Nor is there any merit to the UAE's contention that "[t]here was . . . no reason whatsoever for Qatar, having formally called for the assistance of the CERD Committee, almost instantly then to seek to bypass the Article 11(1) procedure" other than in order to "be in a position to claim that it had made an attempt to negotiate, prior to its attempt to seize the Court"[357]. Nothing in Articles 11 and 22 of the CERD dictates that negotiations cannot take place during the course of the CERD procedures. In fact, the text of the CERD says the exact opposite: as the UAE itself admits[358], Article 11(2) of the Convention expressly references negotiations *as part of the CERD procedures*.

3.58 Finally, it is worth recalling that the Court stated in its Order on provisional measures that:

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355 UAE Preliminary Objections, p. 101, para. 197.

356 *Arbitration of the Tacna-Arica Question (Chile, Peru)*, 4 March 1925, 2 RIAA 921 (1925), p. 930; *see also Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011*, para. 132 (quoting the same).

357 UAE Preliminary Objections, pp. 112–113, paras. 225–226.

358 UAE Preliminary Objections, pp. 102–103, paras. 201–202.

> "the letter contained an offer by Qatar to negotiate with the UAE with regard to the latter's compliance with its substantive obligations under CERD. In the light of the foregoing, and given the fact that the UAE did not respond to that formal invitation to negotiate, the Court is of the view that the issues raised in the present case had not been resolved by negotiations at the time of the filing of the Application"[359].

3.59 In conclusion, Qatar undoubtedly satisfied the negotiation precondition. Even as the UAE stated its "immediate and total refusal" to negotiate, Qatar made many genuine attempts to negotiate with the UAE with a view to resolving the dispute, including through its letter dated 25 April 2018.

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3.60 For the foregoing reasons, the UAE's Second Preliminary Objection to the Court's jurisdiction must be rejected.

[359] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order, I.C.J. Reports 2018*, para. 38.

CHAPTER IV
THE COURT SHOULD REJECT THE UAE'S THIRD PRELIMINARY OBJECTION TO ADMISSIBILITY BASED ON ALLEGED ABUSE OF PROCESS

4.1 The UAE finally asserts that Qatar has "cynically initiated parallel proceedings before the Court in respect of the same dispute whilst the Article 11 procedure was pending before the Committee"[360]. According to the UAE, Qatar's conduct "undermines the authority of the Court and the integrity of the Court's procedures and amounts to an abuse of process"[361], thereby rendering its claims inadmissible[362].

4.2 As explained below, a claim of abuse of process must clear a high threshold and can only succeed in exceptional circumstances, a threshold that the Court has never found to be satisfied (***Part A***). Aware it cannot meet this threshold, the UAE mischaracterizes Qatar's actions and intentions to try to make them seem improper (***Part B***). On any view of the law and the facts, however, there has been no abuse of process, and the UAE's third Preliminary Objection must therefore be rejected.

A. Claims of Abuse of Process Are Subject to a High Threshold

4.3 The UAE submits that the Court "has recognized that an abuse of process can constitute a ground of inadmissibility"[363]. But it forgets to mention that for an

[360] UAE Preliminary Objections, p. 114, para. 230.

[361] UAE Preliminary Objections, p. 114, para. 230.

[362] UAE Preliminary Objections, p. 114, para. 230; *see also ibid.*, p. 118, para. 238.

[363] UAE Preliminary Objections, p. 114, para. 231.

abuse of process claim to succeed, the party asserting it must prove "*extreme* circumstances which have *never* been present in any of the cases decided either by the PCIJ or the ICJ"[364].

4.4 In its recent Judgment in *Certain Iranian Assets*, the Court reaffirmed that it should "reject a claim based on a valid title of jurisdiction on the ground of abuse of process" only in "exceptional circumstances"; there must be "*clear* evidence that the applicant's conduct amounts to an abuse of process"[365]. Similarly, in the words of the very commentator on which the UAE relies, the existence of such an abuse "is not easily to be assumed", but must instead be "*rigorously* proven"[366], and "the threshold for admitting an abuse is *quite high*, and possibly *exacting*"[367]. Indeed, despite having considered claims of abuse on no fewer than 11 occasions, neither the Court nor its predecessor have ever upheld

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364 **Vol. II, Annex 20**, C. Tomuschat, "Article 36", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 789, para. 131 (emphasis added).

365 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, para. 113 (emphasis added); *see also, e.g., Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, para. 150; *Jadhav Case (India v. Pakistan), Judgment, I.C.J. Reports 2019*, para. 49.

366 **Vol. II, Annex 20**, R. Kolb, "General Principles of Procedural Law", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 999, para. 49 (emphasis added).

367 **Vol. II, Annex 20**, R. Kolb, "General Principles of Procedural Law", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 1000, para. 50 (emphasis added); *see also Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), Judgment, 1932, P.C.I.J., Series A/B, No. 46*, pp. 97, 167; *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, 1925, P.C.I.J., Series A, No. 6*, pp. 5, 30, 37–38; **Vol. II, Annex 13**, H. Lauterpacht, *The Development of International Law by the International Court* (Frederick A. Praeger, 1958), p. 164.

them[368], not *once* finding "the conditions for an application of the principle to be fulfilled"[369].

4.5 The UAE's claim in this case is particularly baseless. As Qatar explained in its Memorial, the Court and its predecessor have regularly entertained cases where the parties were simultaneously pursuing other, consensual means for settling their dispute[370].

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[368] *Jadhav Case (India v. Pakistan), Judgment, I.C.J. Reports 2019*, para. 49; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, paras. 113–114; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, paras. 150–152; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, para. 27; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, para. 38; *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction, Judgment, I.C.J. Reports 2000*, para. 40; *Ambatielos Case (Greece v. United Kingdom), Merits: Obligation to Arbitrate, Judgment, I.C.J. Reports 1953*, p. 23; *Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, Judgment, I.C.J. Reports 1960*, pp. 6, 148; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, para. 46; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, paras. 27–28; *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, 1925, P.C.I.J., Series A, No. 6*, pp. 5, 30, 37–38.

[369] **Vol. II, Annex 20**, R. Kolb, "General Principles of Procedural Law", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 999, para. 50 (the Court "has never found the conditions for an application of the principle to be fulfilled."); *see also, e.g.*, **Vol. II, Annex 20**, C. Tomuschat, "Article 36" in A. Zimmerman, et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 789, para. 131.

[370] *See, e.g., United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, para. 43; *Land and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, para. 68; *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order, I.C.J. Reports 1991*, para. 20; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, para. 108; *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, para. 29; *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), Judgment, 1932, P.C.I.J., Series A/B, No. 46*, para. 13.

4.6 For example, in *United States Diplomatic and Consular Staff in Tehran*, the Court found that the establishment of a "fact-finding mission" designed to "hear Iran's grievances and to allow for an early solution of the crisis between Iran and the United States" could not "be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court"[371]. In reaching this conclusion, the Court observed that "[n]egotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes"[372].

4.7 The UAE suggests that the Court's judgment in *Border and Transborder Armed Actions* shows that the Court "takes seriously the prejudicial impact that an ongoing parallel proceeding might have on admissibility"[373]. Further, according to the UAE, while the Court "rejected Honduras's objection" in that case, it "only did so on the grounds that the regional dispute resolution proceedings (the Contadora Process) had, by the date that Nicaragua initiated proceedings, properly reached their conclusion"[374]. As the UAE sees it, this "beg[s] the question" of whether "a different conclusion would have been reached had the Contadora Process been ongoing"[375].

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371 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, paras. 39, 43.

372 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, para. 43.

373 UAE Preliminary Objections, p. 118, para. 236.

374 UAE Preliminary Objections, p. 118, para. 236.

375 UAE Preliminary Objections, p. 118, para. 236.

4.8 However, Honduras' objection was based on the specific title of jurisdiction—Article IV of the Pact of Bogotá—which contains a "fork-in-the-road" provision expressly providing that "[o]nce any pacific procedure has been initiated . . . no *other* procedure may be commenced *until* that procedure is concluded"[376]. The CERD does not contain an analogous provision, and the UAE's erroneous interpretation of Article 22 of the CERD cannot substitute for its absence[377]. Whether or not a different conclusion would have been reached if the Contadora Process had been ongoing is irrelevant. The case does not support the UAE's position.

4.9 Nor can the UAE rely on Honduras' failed argument that "elementary considerations of good faith" bar Qatar from commencing these proceedings[378]. To borrow the words of the Court, the principle of good faith "is not in itself a source of obligation where none would otherwise exist", and there is simply no basis for concluding that Qatar has entered into a "commitment" creating an "obligation" not to institute proceedings before the Court[379]. Indeed, neither Party has asserted that the institution of proceedings before the CERD Committee is exclusive of their other dispute resolution rights. In fact, the UAE has asserted the

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376 *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, para. 77 (quoting Organization of American States, American Treaty on Pacific Settlement, 30 April 1948, Treaty Series, No. 17, 61, Art. IV) (emphasis added).

377 *See* Chap. III, Sec. I, above.

378 *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, para. 94.

379 *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, para. 94.

opposite; namely, that the CERD Committee proceedings must "yield to the ICJ procedure"[380].

4.10 Unable to find any support in the Court's jurisprudence, the UAE seeks to rely on the decisions of four investment treaty tribunals that purportedly "declared the claims in those proceedings inadmissible" on grounds of "abuse of rights"[381]. However, not a single one of those decisions supports the UAE's position either. In none of those cases did the tribunal find the institution of a parallel proceeding—let alone one of a legally nonbinding character—to be an abuse of right. On the contrary, the conduct forming the basis of the tribunals' findings in each case—fraud or the acquisition of an investment for the sole or principal purpose of bringing a claim before an international investment tribunal—was of a radically different and clearly egregious character[382].

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380 *See* **Vol. IV, Annex 120**, *Qatar v. United Arab Emirates*, ICERD-ISC-2018/2, Supplemental Response of the UAE on Issues of Jurisdiction and Admissibility (14 January 2019), para. 41. In *Border and Transborder Armed Actions*, the Court stressed the nonexclusive character of the Contadora Process. *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, para. 97 (noting that "the Contadora Group did not claim any exclusive role for the process it set in train"); *see also ibid.* ("The similar wording of preambular paragraph 35 of the Final Act dated 6 June 1986 makes it clear that the dispute settlement procedures to be adopted under that instrument were not intended to exclude 'the right of recourse to other competent international forums'."); *Land and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, para. 70 ("[N]o provision in the Convention ascribes jurisdiction and a fortiori exclusive jurisdiction to the [Lake Chad Basin] Commission as regards the settlement of boundary disputes . . . . [T]he Commission has never been given jurisdiction, and a fortiori exclusive jurisdiction, to rule on the territorial dispute now involving Cameroon and Nigeria before the Court, a dispute which moreover did not as yet exist in 1983. Consequently, Nigeria's argument must be dismissed"). The same non-exclusivity exists here.

381 UAE Preliminary Objections, p. 114, para. 231.

382 *Churchill Mining* involved claims "based on documents forged to implement a fraud aimed at obtaining mining rights". *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of*

B. THE UAE MISCHARACTERIZES QATAR'S ACTIONS AND INTENTIONS

4.11 Mindful of the high threshold for finding an abuse of process, the UAE mischaracterizes Qatar's actions and intentions in multiple respects in an attempt to show that its "use of the Court's procedures" was "for a purpose that is 'alien to those for which the procedural rights were established'"[383]. The UAE's claims are baseless; still less do they provide "ample evidence" or establish the "inescapable conclusion" that Qatar has "illegitimately sought to make use of the Court's procedures in the present case"[384].

4.12 The UAE complains, for example, that Qatar's Application instituting these proceedings and its Request for Provisional Measures were filed "almost two months" before the UAE's observations before the CERD Committee were due. According to the UAE, the "natural inference" behind these "rushed filings" is that Qatar "had no real intention of pursuing the CERD Committee proceedings

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Indonesia, ICSID Case No. ARB/12/14, 12/40, Award (6 December 2016) (Kaufmann-Kohler, den Berg, Hwang), para. 528. Similarly, *Europe Cement* involved an "assertion of an investment on the basis of documents that according to the evidence presented were not authentic." *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009) (McRae, Lew, Lévy), para. 175. *Phillip Morris* and *Phoenix Action*, for their part, both involved the acquisition of an investment for the sole or principal purpose of bringing a claim. *Phillip Morris Asia, Ltd v. The Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility (17 December 2015) (Böckstiegel, Kaufmann-Kohler, McRae), paras. 585–588; *Phoenix Action, Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2019) (Stern, Fernández-Armesto, Bucher), para. 142.

383 UAE Preliminary Objections, p. 115, para. 232 (quoting **Vol. II, Annex 20**, R. Kolb, "General Principles of Procedural Law", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 998, para. 49).

384 UAE Preliminary Objections, pp. 115–117, paras. 232–233.

to their end, and only sought to demonstrate compliance in form, but not in substance, with the procedural preconditions of Article 22 of the CERD"[385].

4.13 Even if mere inference could meet the threshold for an abuse of process (a position the Court has clearly rejected)[386], the "inference" the UAE asks the Court to make here does not. This is because it rests, among other things, on an interpretation of Article 22 that Qatar has shown to be erroneous[387]. If the "procedural preconditions"[388] of Article 22 are alternative, not cumulative, even the UAE would find it difficult to deny that there was no need for Qatar to take action before the Committee or the Court in any particular order[389]. This, in turn, undermines the UAE's argument that it is the "sequence of procedural events in the present case [that] leads to the inescapable conclusion that Qatar has sought superficially to 'tick the boxes' in order to be able to claim that it had met the procedural preconditions laid down in Article 22", and, in turn, the entirety of its Third Preliminary Objection[390].

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385 UAE Preliminary Objections, pp. 115–117, para. 233.

386 *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, para. 150 (finding that it is only in "exceptional circumstances" and with "clear evidence that its conduct amounts to an abuse of process"); *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Judgment, P.C.I.J. Reports 1926, Series A, No. 7*, p. 30 ("[O]nly a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.").

387 *See* Chap. III, Sec. I, above.

388 UAE Preliminary Objections, pp. 115–117, para. 233.

389 For the same reason, the UAE's suggestion that Qatar's Application was submitted "prematurely" is equally unfounded. *See* UAE Preliminary Objections, p. 117, para. 234.

390 UAE Preliminary Objections, pp. 115–117, para. 233.

4.14 The reality is that Qatar's actions had a much simpler, and entirely legitimate, motivation: to urgently address a pressing and ongoing human rights crisis through all available means[391]. In pursuing this objective, Qatar has, in the words of the Court, "properly submitted in the framework of the remedies open to it" and thus, "such conduct does not amount to an abuse of process"[392].

4.15 The UAE also asserts that Qatar has "continued to pursue the same relief from both the CERD Committee and the Court"[393]. This claim, too, is simply false. Before the Court, Qatar seeks binding determinations of liability[394]. Before the Committee, Qatar seeks a decision on the formation of an *ad hoc* conciliation commission that will issue non-binding "recommendations"[395]. The relief sought is thus plainly of an entirely different nature[396].

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391 Indeed, it was this same urgency that justified the Court's order of provisional measures on 23 July 2018.

392 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, para. 38; s*ee also Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, para. 27.

393 UAE Preliminary Objections, p. 117, para. 234.

394 *See* Qatar Memorial, pp. 367–368; *see also* I.C.J. Statute, Arts. 59, 60.

395 *See, e.g.*, Submission of 14 February 2019, para. 205; *see also, e.g.*, CERD, Art. 13(2); CR 2018/13, p. 18, para. 20 (Pellet) ("Of course, the Committee cannot take binding decisions").

396 Equally unfounded is the UAE's assertion that, by allegedly pursuing the "same relief" before the Court and the Committee, "Qatar has unnecessarily escalated a dispute which . . . could have been resolved through other means". UAE Preliminary Objections, p. 117, para. 234. Setting aside the fact that, as explained above, Qatar simply is not seeking the "same relief" in each forum, Qatar fails to see how it can reasonably be accused of having escalated a dispute by pursuing peaceful means of dispute settlement specifically enumerated in Article 33 of the UN Charter. Moreover, while Qatar would welcome an elaboration by the UAE of the "other means" by which the dispute might be resolved, it notes that the UAE has rejected attempts to negotiate, conciliate and litigate.

4.16 The UAE similarly complains of "unfairness in these proceedings" because, it says, by "[c]ompelling a response from the UAE in the proceedings before the CERD Committee", Qatar allegedly gained "the benefit of advance notice of the arguments likely to be raised by the UAE before the Court"[397]. The UAE does not even attempt to explain how the situation would be any different under the "linear and hierarchical dispute resolution process" it claims Article 22 of the CERD requires[398]. It would not be different. Under the "linear and hierarchical process" that the UAE argues for, the Parties would be *more* likely, not *less* likely, to gain "advance notice" of the arguments to be raised before the Court. In any event, the UAE is decidedly *not* at a comparative disadvantage *vis-à-vis* Qatar. If Qatar will gain any "benefit of advance notice of the arguments likely to be raised . . . before the Court", so too will the UAE[399].

4.17 The UAE's arguments are not just unfounded; they are also inconsistent. The UAE asserts, for example, that Qatar is "attempting to circumvent the role of the CERD Committee in resolving the dispute"[400], and that it has "no real intention of pursuing the CERD Committee proceedings to their end"[401]. Yet, in the very same breath, the UAE alleges that "[b]y spreading its claim simultaneously across two bodies, Qatar gains the ability to attempt to leverage

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397 UAE Preliminary Objections, p. 117, para. 234.

398 UAE Preliminary Objections, p. 118, para. 237.

399 Qatar also fails to see why the Parties should be incentivized to withhold arguments until they are raised before the Court. As Qatar explained at the hearing on the UAE's request for provisional measures, "[c]oncealing hands is a sound practice in games where surprise is the essential route to winning; but this is not a game". CR 2019/6, p. 25, para. 45 (Lowe).

400 UAE Preliminary Objections, p. 117, para. 235.

401 UAE Preliminary Objections, pp. 115–117, para. 233.

any success in one forum to its advantage in the other"[402]. It is difficult to see how Qatar could "leverage any success" it might have if it had "no real intention of pursuing the CERD Committee proceedings to their end"[403].

4.18 That is not the only example of the UAE's conflicting complaints, however. Again forgetting its purported fear that Qatar will "attempt to leverage any success in one forum to its advantage in the other"[404], the UAE claims that "Qatar has created a significant risk that the CERD Committee proceeding and the case before this Court reach contradictory legal outcomes"[405]. In essence, therefore, the UAE complains that Qatar's actions might make contradictory legal outcomes both more *and* less likely.

4.19 Whichever complaint (if any) the UAE really believes, the fact remains that nothing that results from the CERD Committee proceedings can affect the Court's jurisdiction to reach its own conclusions on the facts and the law[406]. In the

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402 UAE Preliminary Objections, p. 117, para. 234.

403 It is similarly difficult to see how the UAE's claim that Qatar is "attempting to circumvent the role of the CERD Committee" is consistent with its complaint that Qatar "strategically re-initiated the CERD Committee proceedings by asking the CERD Committee to take up the dispute again". *See* UAE Preliminary Objections, pp. 115–117, paras. 233, 235.

404 UAE Preliminary Objections, p. 117, para. 234.

405 UAE Preliminary Objections, p. 117, para. 235.

406 Qatar, for its part, submits that the outcomes reached by the Court and the Committee are far more likely to be consistent than not. But the risk of differing outcomes would in any event exist even if the proceedings were conducted consecutively. Indeed, there is a risk of differing outcomes any time a treaty body issues a general comment on a legal issue that is then examined by the Court. The UAE's purported fears that there is a "risk of clash between" the Court and the Committee and that Qatar's actions "place the unity and coherence of international law as a whole under significant threat" are thus plainly unwarranted. *See* UAE Preliminary Objections, p. 118, para. 237.

UAE's own words at the hearing on Qatar's Request for Provisional Measures, while "[t]he views of the CERD Committee may of course be of some interest to the Court . . . the question of interpretation of the Convention is, in the final analysis, *one for the Court alone*"[407].

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4.20 The UAE is not raising its abuse of process claim because it is grounded in the law or the facts. On the contrary, it is making it because, while "successful solely under extreme circumstances", "[a]buse of process is a defence which can be raised easily when the respondent *has no better argument at its disposal*"[408]. That conclusion sums up the UAE's Third Preliminary Objection, which must accordingly be rejected.

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[407] CR 2018/15, p. 23, para. 19 (Olleson) (emphasis added); *see also* CR 2018/13, p. 26, para. 20 (Pellet) ("[o]f course, the Committee cannot take binding decisions and that is precisely why Article 22, in fine, the ultimate safety net, provides the possibility . . . of seising this Court . . .").

[408] **Vol. II, Annex 20**, C. Tomuschat, "Article 36", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 789, para. 131 (emphasis added).

CHAPTER V
THE COURT HAS JURISDICTION TO ADJUDICATE THE UAE'S VIOLATIONS OF THE COURT'S PROVISIONAL MEASURES ORDER

5.1 The UAE does not challenge the Court's jurisdiction to adjudicate the violations of the Order that Qatar has demonstrated in its Memorial[409]. There is no basis on which it might do so.

5.2 The binding character of provisional measures orders issued by the Court pursuant to Article 41 of its Statute is now beyond dispute[410]. Given the purpose of provisional measures to preserve the rights of the parties during the pendency of the dispute and therefore protect the Court's capacity to vindicate those rights[411], provisional measures indicated under Article 41 impose legal obligations

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409 Qatar Memorial, Chap. VI; *ibid*. p. 345, para. 6.5 ("The Court has jurisdiction to adjudicate compliance with the obligations contained in provisional measures orders, separate from its competence to adjudicate Qatar's other claims under the CERD.").

410 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order, I.C.J. Reports 2018*, para. 77 ("The Court reaffirms that its 'orders on provisional measures under Article 41 [of the Statute] have binding effect' (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.").

411 *LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001*, para. 102 ("The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. *The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article*.") (emphasis added).

on the restrained party as of the time they are delivered and in accord with their terms[412]. The measures remain in effect "pending the final decision in the case"[413].

5.3 Equally, the Court's power to issue binding provisional measures necessarily carries with it the jurisdiction to adjudicate alleged violations. The Court has regularly adjudicated such allegations[414].

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412 Concerning the independent nature of the obligations created by provisional measures, see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, para. 129 (explaining that the same conduct may breach territorial sovereignty (one subject of the underlying dispute) and the provisional measures order).

413 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order, I.C.J. Reports 2018*, para. 75 ("Reminding the UAE of its duty to comply with its obligations under CERD, the Court considers that, with regard to the situation described above, the UAE must, *pending the final decision in the case and in accordance with its obligations under CERD*, ensure that families that include a Qatari, separated by the measures adopted by the UAE on 5 June 2017, are reunited, that Qatari students affected by those measures are given the opportunity to complete their education in the UAE or to obtain their educational records if they wish to continue their studies elsewhere, and that Qataris affected by those measures are allowed access to tribunals and other judicial organs of the UAE.") (emphasis added); *see also Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114 ("[T]he provisional measures were indicated 'pending its final decision in the proceedings instituted on May 26th, 1951, by the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran'. It follows that this Order ceases to be operative upon the delivery of this Judgment and that the Provisional Measures lapse at the same time.").

The deposit of Preliminary Objections merely *suspends* the proceedings on the merits. *See* Rules of the International Court of Justice, Art. 79, para. 5. It does not affect the nature or force of the underlying obligations, either the UAE's obligations under the CERD, or under the Order. The Order therefore applies throughout the proceedings, as per its express terms and in line with the purpose for which it was handed down, namely "to protect the respective rights of the parties".

5.4 It follows that provisional measures issued pursuant to Article 41 retain their binding character, and the Court has jurisdiction to adjudicate alleged violations, regardless of the ultimate outcome of the underlying dispute as a matter of either jurisdiction or the merits. Any argument to the contrary would depend on the premise that a party's obligation to comply with an Article 41 order is retroactively contingent on that outcome. Such a premise is flatly inconsistent with Article 41, its object and purpose, the Court's jurisprudence, and, indeed, the very authority of the Court that provisional measures protect.

5.5 The Court confirmed that neither the nature of provisional measures nor the Court's ability to adjudicate compliance are contingent on a particular outcome in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*. Mexico seized the Court's jurisdiction under Article 60 of the Statute, and upon Mexico's request, the Court indicated provisional measures of protection against the United States. Specifically, the Court issued provisional measures ordering that several identified Mexican nationals not be executed "pending judgment on the Request for interpretation submitted by the United Mexican States" unless and until they had received the review and reconsideration

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414 *See, e.g., Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, para. 129; *Application of the Genocide Convention (Bosnia Herzegovina v. Serbia), Judgment, I.C.J. Reports 2007-I*, para. 456; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, para. 115; *see also* **Vol. II, Annex 20**, K. Oellers-Frahm, "Article 41", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 1191.

prescribed by the *Avena* Judgment[415]. Acting by a constituent subdivision, the United States nevertheless proceeded to execute one of those nationals.

5.6 In its Judgment (Interpretation), the Court concluded that Mexico's request was "outside the jurisdiction specifically conferred upon the Court by Article 60."[416] At the same time, however, the Court found that it was nevertheless competent to adjudicate the alleged violation of the provisional measures order, stating that:

> "The Court's competence under Article 60 *necessarily entails* its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60"[417].

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415 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009*, para. 3.

416 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009*, para. 45.

417 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009*, para. 51 (emphasis added); *see also* **Vol. II, Annex 20**, T. Thienel, "Article 60", in A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), p. 1635 ("Where the Court, having ordered provisional measures in Article 60 proceedings, later finds that it may not exercise jurisdiction under this provision for lack of the requirements being fulfilled, it may still make findings about the alleged breaches of the Order indicating provisional measures as part of its incidental jurisdiction under Article 60 read together with Article 41."). The same principle applies in contentious cases brought to the Court pursuant to Article 36 of the Statute and the compromissory clause of a treaty.

The Court then held that the United States had violated the provisional measures issued on the Request for Interpretation[418].

5.7 So too here. The Court's incidental jurisdiction to adjudicate violations of the Order is not contingent on an ultimate finding of jurisdiction under Article 22 of the CERD. It fully suffices that the Court has considered Qatar's request for provisional measures in accord with the criteria by which it exercises its Article 41 power in the context of a dispute brought to it under Article 22 of the CERD and issued a binding mandate governing the UAE's conduct during the pendency of the proceeding. Having confirmed the binding character of provisional measures[419], the Court should not countenance any suggestion that a party bound by provisional measures may decide whether to comply on the basis of a bet that it will prevail on objections to jurisdiction[420].

5.8 In short, the Court has the jurisdiction to determine Qatar's claims that the UAE has violated the Order on an independent, autonomous basis unaffected by the UAE's objections to jurisdiction and admissibility under Article 22 of the CERD.

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418 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009*, paras. 52–53.

419 *LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001*, para. 102

420 *See* **Vol. II, Annex 15**, P. Palchetti, "Responsibility for breach of provisional measures of the ICJ: between protection of the rights of the parties and respect for the judicial function", *Rivista di Diritto Internazionale* 100 (2017), p. 6 ("Failure to comply with obligations laid down in provisional measures not only offends against the authority of the Court; it undermines the effective administration of justice in a particular case.").

5.9 As Qatar has shown throughout these proceedings, the UAE—by its own account—has deliberately penalized Qatari people as a means to pressure the Qatari State. In so doing, it has violated the fundamental rights of Qataris and trespassed on the interests of the entire international community. Not only is this approach contrary to the basis and spirit of human rights law, it directly contravenes a fundamental norm of international law protected by the CERD—the prohibition on racial discrimination. The UAE's attempts to mischaracterize its actions and this dispute do not deprive the Court of jurisdiction *ratione materiae*. As Qatar has shown, upon a good faith interpretation of Article 1 in accordance with international law, and on an objective determination of the UAE's actions, as well as the intentions and the effects of those actions, there is no doubt that the UAE's wrongful acts fall squarely within the scope of the treaty.

5.10 Nor is there any merit, in fact or in law, to the UAE's Second Preliminary Objection. The UAE seeks to avoid scrutiny of its actions, while also claiming that there is nothing to scrutinize. The UAE's objections are based upon an interpretation of Article 22 of the CERD that is irrational and that sits in opposition to the meaning and context of the words used, with the *travaux préparatoires*, and with the object and purpose of the CERD to eliminate racial discrimination.

5.11 Finally, there can be no abuse of process where a party pursues a dispute resolution system to which the other party has consented, with the objective of ending racial discrimination and in furtherance of the peaceful resolution of disputes. To the contrary, that is the course that international law encourages States to take.

5.12 Qatar reserves the right to amend or supplement these observations on the UAE's Preliminary Objections and the Submissions that follow as appropriate in light of further pleadings.

SUBMISSIONS

For the reasons described above, Qatar respectfully requests that the Court:

1. Reject the Preliminary Objections presented by the UAE;

2. Hold that it has jurisdiction to hear the claims presented by Qatar as set out in the Memorial, and that these claims are admissible; and

3. Proceed to hear those claims on the merits.

Respectfully submitted,

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Dr. Mohammed Abdulaziz Al-Khulaifi

AGENT OF THE STATE OF QATAR

30 AUGUST 2019

CERTIFICATION

I certify that all Annexes are true copies of the documents referred to and that the translations provided are accurate.

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Dr. Mohammed Abdulaziz Al-Khulaifi
AGENT OF THE STATE OF QATAR
30 AUGUST 2019

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STATE OF QATAR GOVERNMENT DOCUMENTS AND STATEMENTS

UNITED NATIONS DOCUMENTS

Annex 8 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, document E/C.12/GC/29 (2 July 2009)

CERD COMMITTEE DOCUMENTS AND PROCEEDINGS

Annex 9 CERD Committee, *Summary Record of the Two Hundred and Twelfth Meeting*, document CERD/C/SR.212 (20 August 1974)

Annex 10 CERD Committee, *General Recommendation No. 29 on article 1, paragraph 1, of the Convention (Descent), Sixty-first Session* (2002)

INTERNATIONAL ORGANIZATION DOCUMENTS

Annex 11 International Labour Conference, *Discrimination in the field of employment and occupation*, 40th session, Geneva, 1957, Report VII(1)

Annex 12 International Labour Conference, *Discrimination in the field of employment and occupation*, 42nd session, Geneva, 1958, Report IV(2)

BOOKS, ARTICLES, AND NEWS ARTICLES

Annex 13 H. Lauterpacht, *The Development of International Law by the International Court* (Frederick A. Praeger, 1958), pp. 158–172

Annex 14 P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), pp. 484–502

Annex 15 P. Palchetti, "Responsibility for breach of provisional measures of the ICJ: between protection of the rights of the parties and respect for the judicial function", *Rivista di Diritto Internazionale* 100 (2017)

Annex 16 J. Gambrell, "Emirati diplomat to AP: 'Nothing to negotiate' with Qatar", *Associated Press* (7 June 2017), https://apnews.com/3a69bad153e24102a4dd23a6111613ab

Annex 17 "Qatar condemns Saudi refusal to negotiate over demands", *BBC* (28 June 2017), https://www.bbc.com/news/world-middle-east-40428947

Annex 18 N. Al Wasmi, "UAE and Saudi put pressure on Qatar ahead of demands deadline", *The National* (28 June 2017), https://www.thenational.ae/world/uae-and-saudi-put-pressure-on-qatar-ahead-of-demands-deadline-1.92119

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Annex 20 A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), pp. 712–798, 963–1006, 1135–1202, 1617–1650

OTHER DOCUMENTS

Annex 21 Chambers Dictionary, Definition of "national", https://chambers.co.uk

Annex 272-A Affidavit, State of Qatar Compensation Claims Committee, dated 21 August 2019 (with certified translation), and Exhibit A