DECLARATION OF JUDGE *AD HOC* DAUDET

[Translation]

Qatar's efforts towards a judicial settlement — Second preliminary objection not examined by the Court — Article 22 of CERD — Role of the CERD Committee — Agreement with the Court's reasoning and decision on the first preliminary objection — Distinction between "national origin" and "nationality" — Lack of jurisdiction ratione materiae *— Importance of the binding nature of orders indicating provisional measures — Exclusively preliminary character of the first objection — Conciliation procedure — Diplomatic settlement of the dispute.*

1. The Court has already had occasion to review the factual background of the present case (see Judgment, paras. 26 *et seq*.), not only at the time of its Order on the provisional measures requested by Qatar (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 406), but also in connection with its Judgments of 14 July 2020 in the cases concerning *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar)* and *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates* v. *Qatar)* (paras. 21-26). It is clear that Qatar has been committed to finding a peaceful and judicial settlement to its dispute with its Gulf neighbours, a dispute with particularly serious repercussions for it, which arose as a result of its neighbours' alleged violations of the 2013 and 2014 Riyadh Agreements, to the detriment of Qatar, and of Qatar's purported support for international terrorism.

2. It was not possible to seise the Court by way of special agreement, which had evidently been ruled out by the Parties; and none of the Parties had made the declaration provided for under Article 36, paragraph 2, of the Court's Statute. That left the option of a compromissory clause included in a treaty. Since Article 22 of CERD contained such a clause, the Convention emerged as the only possible title of jurisdiction that could serve as a basis for Qatar's Application. However, its implementation was not self-evident in this instance and the UAE did not err in filing preliminary objections to the Court's jurisdiction.

3. The two preliminary objections presented by the UAE (which had originally raised three) were independent of each other. In keeping with the jurisprudence of the Court recalled in paragraph 114 of its Judgment, having upheld the first objection, the Court did not consider it necessary to examine the second one, relating to the procedure under Article 22 of CERD.

4. If the Court had addressed that objection, I would have voted in favour of its dismissal. Indeed, in light of the evidence in the case file, I am of the view that Qatar had pursued the prior negotiations required to seise the International Court of Justice to a point where their continuation appeared futile and headed towards "deadlock[]" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 419, para. 36; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 130, para. 150). The fulfilment of this precondition alone was sufficient to establish the Court's jurisdiction, since the other precondition contained in Article 22, i.e. recourse to the procedures provided for in Articles 11 to 13 of CERD, is not cumulative but an alternative to the first, as recently determined

by the Court (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 600, para. 113).

5. Qatar did, however, have recourse to the second procedure under Article 22, which led to a conciliation process. It did so even before it seised the Court, and independently of that seisin, for which such recourse was not a prerequisite, the precondition for seising the Court having already been satisfied by the failure of negotiations; this resulted in two sets of proceedings — one before the Court and one before the CERD bodies — taking place in parallel. The UAE, which during the hearings withdrew its third preliminary objection that Qatar's "abuse of process" should cause its "claims [to be] inadmissible" (Preliminary Objections of the United Arab Emirates, Vol. I, para. 238), nonetheless argued that Qatar should have refrained from seising the Court until the conciliation process under CERD had ended.

6. The disputes brought before the Court are never minor, and this one, which began on 5 June 2017, is certainly no exception. There is no doubt that both Parties wish it to come to an end, but it is understandable that Qatar in particular should want to do so as soon as possible. I thus regard its pursuit of parallel proceedings as a way of facilitating this, and I see nothing problematic, much less irregular, in this situation, since the proceedings are taking place before two different bodies and have different effects. On the one hand, there is the Court, the "principal judicial organ of the United Nations", which today rendered a *res judicata* judgment; on the other, there is a conciliation body which may, on the basis of international law, offer a solution to the dispute which the Parties are free to accept. While the Court found today that it lacks jurisdiction, the CERD Committee determined on 27 August 2019 that Qatar's claim based on Article 11 of the Convention is admissible and decided to form a Conciliation Commission as provided for by Article 12. The Commission took up its functions on 1 May 2020, and may now, therefore, find a solution bearing in mind the Court's decision.

7. The Court found that it lacks jurisdiction by upholding the UAE's first preliminary objection. I deeply regret that it is therefore unable to settle this dispute and perhaps enable Qatar to recover the rights of which I myself believe it has been deprived by the UAE.

8. Nevertheless, I voted in favour of the finding that the Court lacks jurisdiction, because I fully agree with the reasoning set out in the Judgment. This includes, in particular, the position expressed by the Court in its interpretation of Article 1, paragraph 1, of CERD, whereby it considered that "national origin", which appears in the Convention, is different from "nationality", which does not; that national origin does not encompass nationality; and that the two notions are not equivalent or interchangeable, neither in letter nor in spirit. I supported this position because I believed, in good conscience, that it was the correct legal interpretation of Article 1, paragraph 1, and that this consideration took precedence over any other.

9. I would nonetheless recall that, by its 2018 Order (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 433, para. 79), which I supported, the Court indicated the most important of the provisional measures requested by Qatar. Since the Court's landmark ruling in *LaGrand* (*(Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109), subsequently well established in its jurisprudence (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263; *Certain Activities Carried Out by Nicaragua in the*

Border Area (Costa Rica v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 26-27, para. 84; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 433, para. 77), the Court's orders on provisional measures have had binding effect. This situation has therefore enabled Qatar to recover many of its rights, subject to the proper implementation of the Order by the UAE.

10. I also carefully considered the question whether the interpretation of Article 1, paragraph 1, possessed an exclusively preliminary character. It is often possible to find links of varying strength between jurisdiction and the merits. Interpreting what determines jurisdiction frequently entails analysing facts or evidence pertaining to the merits, in which event the question raised does not have an exclusively preliminary character. That does not seem to be the case here. Nationality is a well-known concept in international law, and defining it in relation to national origin for the purposes of determining whether the inclusion of one term and not the other in Article 1, paragraph 1, of CERD should be understood as incorporating both, is a purely legal and abstract question which can be answered without any examination on the merits. I thus considered that it would be artificial to regard the question as not having an exclusively preliminary character.

11. In conclusion, therefore, the Court's decision is, in my view, perfectly well founded in law. Strict though it may seem, it is quite simply the only possible application of international law. Needless to say, I do not see in it a justification for the UAE's actions against Qatar, many of which constitute human rights violations under several international conventions. In the present case, however, it was CERD which, without any reservations from either State, contained a compromissory clause allowing for the Court to be seised. It was thus CERD alone that could be invoked, as I mentioned above (paragraph 2). It might subsequently have been for the Conciliation Commission to propose a solution following the delivery of the Court's Judgment.

12. Indeed, that possibility had been agreed to by the UAE, whose Ambassador stated at the close of the hearings: "We will engage in good faith with the Conciliation Commission even if you find in our favour on the issue of nationality" (CR 2020/8, p. 42, para. 8 (AlNaqbi)).

13. However, a few weeks later, a reconciliation process was initiated between the Gulf countries. We can take heart that all their disagreements are thus expected to be resolved peacefully even as the Court is delivering its Judgment, which, it should be recalled, addresses only its jurisdiction, without examining the merits of a dispute which the States themselves declare, in an atmosphere of new-found serenity, will soon be over.

(Signed) Yves DAUDET.

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