INTERNATIONAL DECISIONS

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International Court of Justice—International Convention on the Elimination of All Forms of Racial Discrimination (CERD)—preliminary objections on jurisdiction—discrimination based on nationality or national origin—Committee on the Elimination of Racial Discrimination (CERD Committee)

QATAR V. UNITED ARAB EMIRATES. Judgment, Preliminary objections. *At* https://www.icj-cij.org/en/case/172.
International Court of Justice, February 4, 2021.

On June 5, 2017, the United Arab Emirates (UAE) prohibited, *inter alia*, entry by nationals of Qatar and gave Qatari residents and visitors fourteen days to leave the country. The UAE alleged that its actions were a response to Qatar's failure to abide by its commitment to allow return of Gulf Cooperation Council diplomats to Doha, and its support of terrorism. In 2018, Qatar instituted proceedings against the UAE before the International Court of Justice (ICJ or the Court), alleging violations of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD or the Convention). The case raised difficult questions of treaty interpretation in a sensitive area of law and politics—the prohibition against racial discrimination. The Court's preliminary objections judgment addressed the distinction between discrimination based on nationality and on national origin, as well as whether the UAE measures represented *de facto* discrimination.

Qatar made three main claims: first, that measures it described as the "expulsion order" and the "travel bans," by their express references to Qatari nationals, racially discriminated against Qataris on the basis of their current nationality; second, that the UAE imposed discriminatory measures on certain Qatari media corporations; and, third, that the UAE had engaged in indirect discrimination against persons of Qatari national origin by taking these measures. Qatar asserted that the Court had jurisdiction pursuant to Article 36, paragraph 1, of the Statute of the Court and Article 22 of CERD.

The ICJ first addressed its jurisdiction in its Order of July 23, 2018 indicating provisional measures. The Court concluded by a narrow 8–7 majority that the UAE measures were "capable of falling within the scope of CERD *ratione materiae*." At this point, the Court determined that it need not resolve the key interpretive question of whether "the expression 'national . . . origin' mentioned in Article 1, paragraph 1, of CERD, encompasses discrimination based on the 'present nationality' of the individual" (para. 27). However, Judges Tomka, Gaja, and Gevorgian appended a joint declaration emphasizing the difference between discrimination

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based on nationality and on national origin. This was also the view of Judges Crawford and Salam in their respective dissenting opinions.

In parallel to the ICJ litigation, Qatar petitioned the CERD Committee—the treaty body that monitors implementation by states parties—to determine whether the UAE had violated its obligations under the Convention. In its decision of August 27, 2019, the CERD Committee held that it was competent to examine whether differences between citizens and non-citizens "pursue a legitimate aim, are proportional to the achievement of this aim and do not result in a denial of fundamental rights of non-citizens." Therefore, in the CERD Committee's view, Qatar's allegations did not fall outside the scope of CERD.[1]

In the present proceedings, the UAE argued that the ICJ lacked jurisdiction to address the claims brought by Qatar on the basis of two preliminary objections. In its first objection, the UAE reiterated its argument that the Court lacked jurisdiction *ratione materiae* because the acts alleged by Qatar did not fall within the scope of CERD. Second, the UAE asserted that Qatar failed to satisfy the procedural preconditions of Article 22 of CERD.

The Court, by a 11–6 vote, reached the opposite conclusion to that of the decision on provisional measures and of the CERD Committee, namely that CERD did not apply to the UAE measures. It also concluded that media corporations were not protected by the Convention and that there was no indirect discrimination. Having found that it did not have jurisdiction *rationale materiae*, the Court found it unnecessary to examine the UAE's second preliminary objection on the procedural requirements of CERD.

In its examination of whether the term "national origin" encompassed current nationality, the Court referred to the customary international law principles on treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[2] It accordingly discussed the term "national origin" on the basis of its ordinary meaning, read in its context and in light of the object and purpose of CERD. The Court then examined the *travaux préparatoires*, before discussing the practice of the CERD Committee.

The ICJ recalled that "interpretation must be based above all upon the text of the treaty" (para. 81). It noted that the definition of racial discrimination in CERD includes "national or ethnic origin" However, it held that "[t]hese references to 'origin' denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime" (*id.*). It noted that "the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth" (*id.*).

The Court next turned to the context in which the term "national origin" is used in the Convention, in particular paragraphs 2 and 3 of Article 1 which, respectively, provide that CERD "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens" and that nothing in CERD "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

[1] Decision on the Admissibility of the Inter-state Communication Submitted by Qatar Against the UAE Dated 27 August 2019, para. 63, UN Doc. CERD/C/99/4, *at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/097/19/PDF/G2009719.pdf?OpenElement.

[2] Vienna Convention on the Law of Treaties, Arts. 31–32, May 23, 1969, 1155 UNTS 331.

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discriminate against any particular nationality." The Court found that paragraph 3, read in light of paragraph 2 (with its explicit exclusion of distinctions between citizens and non-citizens), supported the interpretation of the ordinary meaning of the term 'national origin' as not encompassing current nationality (para. 83).

The Court then examined the object and purpose of the Convention and recalled that it has frequently referred to a treaty's preamble to determine its object and purpose (para. 84). It found that the preamble, as well as CERD's history, indicated that "[t]he aim of the Convention is . . . to eliminate all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth" (para. 86). It concluded that "the term 'national origin' in Article 1, paragraph 1, of CERD, in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality" (para. 88). This was also supported by the *travaux préparatoires* (para. 97).

As regards the practice by the CERD Committee, the ICJ recalled that "in the *Diallo* case[3] . . . it indicated that it should 'ascribe great weight' to the interpretation of the International Covenant on Civil and Political Rights—which it was called upon to apply in that case—adopted by the Human Rights Committee" (para. 101). The Court noted, however, that "in this regard . . . it was 'in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee.'" The ICJ declined to do so here. Instead, the Court merely stated that it had "carefully considered the position taken by the CERD Committee" without indicating that any weight had been given to the Committee's interpretation (*id.*). Finally, it found that the jurisprudence by regional human rights courts did not provide much guidance on the interpretation of "national origin" in CERD (para. 104). The Court thus concluded that the term "national origin" does not encompass current nationality. As a result, Qatar's measures did not fall within the scope of CERD (para. 105).

The Court also rejected Qatar's second claim. It considered that CERD's reference to "institutions" did not include media corporations. Instead, it found that this term refers to "collective bodies or associations, which represent individuals or groups of individuals" (para. 108).

Finally, the Court adopted a narrow interpretation of indirect—or *de facto*—discrimination. It observed

> that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may constitute racial discrimination if it "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." (Para. 112.)

It thus articulated the test as a disjunctive. On this reading, "the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect" (*id.*) However, the Court found that "[i]n the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens

[3] Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 ICJ Rep. 324 (June 19).

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residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention" (*id.*). The ICJ did not further explain its reasoning on this point, and did not clarify why discriminatory effects of this kind would not satisfy the purpose or effect test. The Court simply concluded that the complained of measures do not, "either by their purpose or by their effect give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin," and that "even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention" (*id.*).

The dissenting opinions addressed various aspects of the majority's reasoning. Judges Bhandari and Robinson disagreed with the majority's distinction between nationality and national origin based on a reading of CERD and its *travaux préparatoires*. The two judges held that national origin should be interpreted as referring to a person's belonging to a country or nation. They held that this was supported by the wording of CERD, as well as the object and purpose and by the *travaux préparatoires*.

Judge Bhandari further argued that the majority "does not take into account the observation that 'it should ascribe great weight' to interpretations" by the CERD Committee, and that the judgment "provides no compelling reasons as to why it has chosen to depart from the reasoning in *Diallo* in this dispute, despite the fact that the CERD Committee remains 'the guardian of the Convention'" (diss. op., Bhandari, J., para. 21). Judge Robinson stated that:

> [t]here is no reason why the Court should not attach great weight to the recommendations of the CERD Committee (which is properly seen as the guardian of the Convention), if they are not in conflict with international human rights law or general international law. This approach will promote the achievement of the clarity, consistency and legal security which the Court referred to in *Ahmadou Sadio Diallo*. It is regrettable that, in this case, the Court did not follow the CERD Committee's recommendation. Notably, the majority did not offer any explanation for not following it. (Diss op., Robinson, J., para. 13.)

Judges Yusuf, Sebutinde, and Iwasawa (respectively in a declaration, dissenting opinion, and separate opinion) emphasized that CERD also protects against indirect discrimination. As stated by Judge Iwasawa:

> If it were proven on the facts that the measures have an unjustifiable disproportionate prejudicial impact on an identifiable group distinguished by national origin and that they were not based exclusively on nationality, the measures would constitute racial discrimination within the meaning of the Convention, in accordance with the notion of indirect discrimination." (Sep. op., Iwasawa, J., para. 66).

In contrast to the majority, these judges were not willing to dismiss Qatar's claim of indirect discrimination. They held that the Court would need more evidence and arguments from the parties to resolve this issue. Therefore, in their view, the UAE's objection did not have an exclusively preliminary character and should have been determined at the merits stage.

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International society has expressed strong opposition to racism. This is reflected in the International Law Commission's Draft Articles on State Responsibility of 2001, stating

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that racial discrimination is clearly recognized among national and international tribunals to be among the peremptory norms (*jus cogens*) of international law.[4] However, the issue of racial discrimination remains legally controversial in practice. The debate in the 1960s following the ICJ's *South West Africa* cases on apartheid is well known. While the current dispute is not about combating apartheid, the question of what should be considered racial discrimination continues to divide the Court and has now engendered a conflict between the ICJ and the CERD Committee. It is striking that among the six dissenting judges, five come from former colonies (Yusuf, Cançado Trindade, Sebutinde, Bhandary, and Robinson), whereas the sixth is Japanese (Iwasawa).

It has long been discussed whether human rights conventions require special methods of interpretation. The ICJ has not dealt with many human rights cases. But what is notable is the similarity between the ICJ's approach to treaty interpretation and that of specialized human rights courts and tribunals.[5] Neither does it seem that the disagreement on the distinction between national and national origin in the present case reflects different approaches to the principles of treaty interpretation. Taking into account that states' differentiation based on nationality is commonplace, e.g., on access to the territory or diplomatic protection, the majority's decision comes as no surprise. Yet, such differentiation may be seen as unlawful discrimination in treaties other than CERD, especially in human rights and trade.

Another issue dividing the Court was whether the UAE measures represented indirect discrimination against individuals of Qatari origin. The CERD Convention establishes that racial discrimination also includes differentiation based on national origin, which has "the purpose or effect" of impairing equal human rights and fundamental freedoms. The majority's rejection of the UAE measures as indirect discrimination is extremely compact and not fully convincing. One would have expected it to discuss both whether these measures had an illegitimate purpose and whether their effects were unlawful. As pointed out by Judge Iwasawa, the principle of proportionality could be relevant in balancing the measures' ability to achieve the purported objective and their negative impacts on the protected group. The majority does not venture into any of these issues. The result is that the Court neither provides guidance on the interpretation of what should be considered racial discrimination, or, more generally, on non-discrimination as a concept in general international law.

It was not until the *Diallo* case that the ICJ addressed the legal status of the practice from human rights treaty bodies. The Court stated in that case that the Human Rights Committee's practice should be accorded "great weight" since it was "established specifically to supervise the application of [the International Covenant on Civil and Political Rights]" (para. 66). But the Court also used a "systemic" argument for relying on the Committee's practice—referring to the need "to achieve the necessary clarity and the essential consistency of international law, as well as legal security" (*id.*). In contrast to *Diallo*, the ICJ came in the present case to the opposite conclusion to that of the CERD Committee, another UN human rights treaty body. The Court had therefore the possibility of demonstrating the real legal weight of pronouncements of such bodies and its willingness to engage in a dialogue with

[4] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, II(2) Y.B. Int'l L. Comm'n, 85 (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[5] James Crawford & Amelia Keene, *Interpretation of the Human Rights Treaties by the International Court of Justice*, 24 Int'l J. Hum. Rts. 935, 947 (2020).

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them. It failed to live up to both expectations. The ICJ could not distinguish the issues, as it did in the 2007 *Genocide* case. There, the Court argued that the standard of "overall control" applied by the International Criminal Tribunal for the former Yugoslavia's (ICTY) Appeals Chamber in the *Tadić* case, for the purpose of international criminal law, was not necessarily in conflict with the "effective control" required for establishing state responsibility.[6] However, in the present case, the ICJ and the CERD Committee interpreted the same obligations of the CERD Convention.

In the abstract, it is debatable which institution should be the lead agency for interpreting the CERD Convention: the general ICJ or the specialized CERD Committee. The paramount position of the ICJ as "the principal judicial organ of the United Nations"[7] should be recognized, even more so with respect to *jus cogens* issues. Arguably, this is also implied in Article 22 of CERD, designating the ICJ as the tribunal of last resort. Yet the Court itself laid out the best counterargument in *Diallo*, where it prioritized respecting the decision of the parties to human rights instruments in setting up a supervisory mechanism and ensuring the clarity and consistency of international law. The appreciation of the CERD Committee calls for an inclusive dialogue, addressing the arguments used by the Committee and showing where it went wrong. The Court should also have explained its approach to the weight to be granted to interpretations by human rights supervisory organs according to *Diallo*. Instead, despite its prior commitments, the Court undertook its own *de novo* interpretation. This casts doubts on the weight given to human rights supervisory organs interpretations.

This case was decided by a comfortable majority of 11–6. However, the split between judges coming from developing and developed countries may raise suspicion that extralegal factors may have influenced the Court. It comes as no surprise that approaches to international law differ between different regions of the world.[8] Since judges from developing states have come into the majority on the Court, there has been a perception of less division between North and South on the bench.[9] However, the *Marshall Islands* case (2016) provides a recent example of a split along political lines only determined by the president's casting vote. Most of the minority judges came from developing countries.[10] Yet, in the *Chagos* advisory opinion (2019), the Court was less split, deciding by 13–1 that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible."[11] It is essential for the ICJ to demonstrate that all legal cultures and approaches to international law are represented and heard in cases on globally controversial issues. While the combination of the majority decision and the various separate opinions reveal that all relevant

[6] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ Rep. 43, paras. 403–04 (Feb. 26).

[7] UN Charter, Art. 92.

[8] ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017).

[9] Rainer Hofmann & Tilmann Laubner, *Article 57*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, 1540–41 (Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm & Christian Tomuschat eds., 2d ed. 2012) (with further references).

[10] Nico Krisch, *Capitulation in The Hague: The Marshall Islands Cases*, EJIL:*TALK!* (Oct. 10, 2016), *at* https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases. See also in the *AJIL Unbound* Symposium: Anthony Anghie, *Politic, Cautious, and Meticulous: An Introduction to the Symposium on the* Marshall Islands Case, 111 *AJIL Unbound* 62 (2017) (with further references).

[11] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95, para. 178 (Feb. 25).

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perspectives have been considered in the present case, divisions along seemingly political lines may threaten the Court's legitimacy.

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Peruvian Constitutional Tribunal—women's right to live free from violence—international (human rights) law—inter-American human rights system—relationship between international and domestic law

FILE 03378-2019-PA/TC. *At* https://tc.gob.pe/jurisprudencia/2020/03378-2019-AA.pdf. Peruvian Constitutional Tribunal, March 5, 2020

On March 5, 2020, the Peruvian Constitutional Tribunal (PCT or Tribunal) unanimously rejected the writ of *amparo* (a procedure for protecting constitutional rights) filed by Jorge Guillermo Colonia Balarezo (petitioner). The Tribunal found that a woman's right to live free from violence justifies limiting an aggressor's right to a hearing in certain contexts—here concerning judicial measures to protect women's physical and psychological integrity. In reaching this conclusion, the PCT relied on and contributed to the development of international law regarding the right of women to live free from violence.

On October 24, 2018, María Luis Paredes Tambra accused the petitioner of psychological violence against her before a family court. The Tribunal ordered protective measures without affording the petitioner a hearing. The measures were subsequently ratified by the High Court (p. 1). On April 1, 2019, the High Court rejected the petitioner's *amparo* which alleged that these judicial decisions violated his right to a hearing (pp. 1–2). The petitioner then filed an *amparo*, on the same grounds, before the PCT on July 24, 2019 (*id.*).

The PCT first examined the *amparo* for admissibility (paras. 4–13). The High Court had declared the request for the writ to be inadmissible *in limine* because, in its view, the petition seemingly did not relate to a constitutional matter concerning human rights (para. 5). Relying on international human rights law, the PCT overruled this finding. It emphasized the need to consider Article 8(1) of the American Convention on Human Rights (ACHR), which recognizes everyone's "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in . . . any accusation of a criminal nature made against him" or to determine "his rights and obligations of . . . any . . . nature" (para. 6). The PCT concluded that the *in limine* inadmissibility of the *amparo* was unjustified because the right to a hearing *prima facie* guarantees the right to be heard in any judicial process that determines rights or obligations (para. 7).

The PCT then confronted the core question of the *amparo* on the merits: whether measures to protect a woman who is a victim of violence can breach the right to a hearing of the petitioner who is accused of being the aggressor (paras. 14–93). First, the PCT examined the non-derogable content of the right to a hearing (paras. 14–18). Quoting Article 8(1) of the