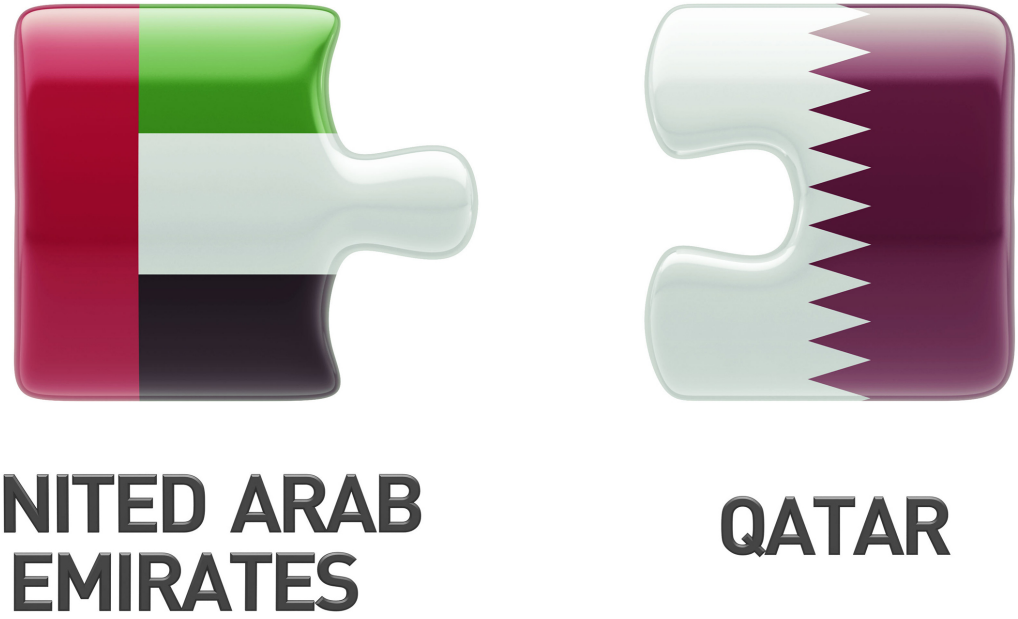


A Narrowed Scope of “National Origin” Discrimination under CERD by the International Court of Justice

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On February 4, 2021, the International Court of Justice (ICJ) in a rare case on discrimination in international human rights law, decided to narrow the protection provided by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) by formally characterizing a complex claim of racial discrimination made on the ground of national origin as one based on “current nationality” and not “national origin”. This enabled the Court to dispense with examining the merits of the alleged discrimination against Qatari nationals by the United Arab Emirates (UAE) in an 11 to 6 decision on Preliminary Objections to its subject-matter jurisdiction over the case.

Qatar's allegations of racial discrimination

On June 11, 2018, Qatar instituted proceedings by filing an Application in the ICJ against the United Arab Emirates (UAE) alleging breaches of articles 2,4,5,6, and 7 of CERD for:

- "Expelling, on a collective basis, all Qataris from, and prohibiting the entry of all Qataris into, the UAE on the basis of their national origin;
- Violating other fundamental rights, including the rights to marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education and training, property, work, participation in cultural activities, and equal treatment before tribunals;
- Failing to condemn and instead encouraging racial hatred against Qatar and Qataris and failing to take measures that aim to combat prejudices, including by inter alia: criminalizing the expression of sympathy toward Qatar and Qataris; allowing, promoting, and financing an international anti-Qatar public and social-media campaign; silencing Qatari media; and calling for physical attacks on Qatari entities; and
- Failing to provide effective protection and remedies to Qataris to seek redress against acts of racial discrimination through UAE courts and institutions."

Qatar sought an Order against UAE, inter alia, "to immediately cease and revoke the discriminatory measures, including but not limited to the directives against 'sympathizing' with Qataris, and any other national laws that discriminate de jure or de facto against Qataris on the basis of their national origin".

Committee on the Elimination of Racial Discrimination (CERD Committee) proceedings

Qatar also deposited a rare inter-State communication with the CERD Committee in March 2018 requesting that the UAE take all necessary steps to end the measures UAE enacted and implemented since June 5, 2017 that breached CERD. On August 27, 2019, 13 members of the Committee rejected UAE's submissions on the admissibility of the communication by concluding that it had subject-matter jurisdiction.

The Committee applied its constant practice concerning differences of treatment based on nationality discussed in General Recommendation 30. It wrote at para. 63 of its decision on admissibility in Qatar v. UAE that it had subject-matter competence in a matter involving differential treatment between citizens and non-citizens, "…whether such differences pursue a legitimate aim, are proportional to the achievement of that aim and do not result in a denial of fundamental human rights of non-citizens" and further, do not discriminate against a particular nationality. It appointed an ad hoc Conciliation Commission to seek an amicable solution. The Committee started work in March 2020.

Proceedings in the International Court of Justice

Preliminary Measures

The Court indicated Preliminary Measures in its Order of July 23, 2018 (PMO). It stated that its jurisdiction over the case turned on whether there was a dispute under article 22 of CERD:

“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”

The Court did decide the scope of “national origin” at the PMO stage. Rather, it held it had the necessary *prima facie* jurisdiction to make the PMO on the basis that the factual allegations of the prohibition of Qatari entry into the UAE and expulsions of Qatari from the UAE and the effects of the restrictions and other measures were capable of constituting a dispute within the subject-matter scope of CERD and would cause irreparable prejudice (PMO, paras. 27-8, 41, 69). It ordered the UAE to ensure the reunion of effected Emirati-Qatari families, to allow students whose education was disrupted by the measures to finish their education in the UAE or to obtain their educational records to continue it elsewhere, and, to allow Qataris affected by the measures access to UAE tribunals and judicial processes (PMO, para. 79).

The Court later refused to indicate a preliminary measure sought by the UAE (UAE PMO) to order Qatar to withdraw its Communication to the CERD Committee at (UAE PMO, para. 18) because this was not a plausible right under CERD. The Court had earlier rejected the argument that it had to decide whether the CERD Committee and its own proceedings should be going at the same time (PMO, para. 39).

The Preliminary Objection

Perhaps the critical juncture in the case was the majority’s statement that the Court’s first duty was to determine the objective basis for the dispute by ‘isolating the real issue in the case’ based on the pleadings of the parties, a matter of substance and not form (para. 42). This enabled it to characterize a threshold issue about whether “current nationality” was encompassed by “national origin” in article 1.

The Court’s characterization process first took note that Qatar alleged the measures taken against them were based on their “national origin” (paras. 42-3). The Court then observed that Qatar had argued that the travel and expulsion measures discriminated against Qatari on the basis of current nationality which it had maintained was encompassed by the ground of national origin (para. 45). Next the Court noted Qatar alleged racial discrimination against Qatari corporations: article 2(1)(a) of CERD requires states party to refrain from engaging in acts of racial discrimination against “institutions”. Third, the Court considered that Qatar alleged indirect discrimination in that various of the impugned measures had the purpose or effect of nullifying or impairing the rights and freedoms of persons of Qatari national origin in the sense of their Qatari heritage and culture, even though the measures might be overtly based on current nationality (para. 47). Qatar also alleged that the UAE government

had engaged in anti-Qatari hate propaganda and criminalized pro-Qatari speech (para. 49). To make the point clear that its argument was not about current nationality, Qatar emphasized that their case was always based on unjustifiable indirect discrimination because the impugned measures penalized persons of Qatari national origin (even if they were not Qatari nationals) based on identification with Qatari national traditions, culture, Qatari accent, Qatari dress or cultural identification as Qatari (para. 50).

UAE argued that nationality is not the same as national origin, that the restrictions on media corporation and free speech were content restrictions in the context of anti-terrorism. UAE objected that the indirect discrimination claim had not been pleaded.

The Court then carried out its “duty” to characterize the claims before it (para.70). The first was whether the travel ban and expulsion order by their express reference to Qatari Nationals discriminated on the basis of current nationality. The second was whether CERD applied to restrictions on Qatari media corporations. The third was whether the travel and expulsion orders, the restrictions on Qatari media corporations, and other measures that attacked freedom of expression – inciting anti-Qatari sentiment, criminalizing pro-Qatari speech or speech critical of UAE anti-Qatari policies as well as UAE governmental statements that express or condone anti-Qatari hate speech and propaganda - constituted indirect discrimination on the basis of Qatari national origin.

In answer to UAE’s objection that the indirect discrimination claim had not been pleaded, the Court held that the parties had some leeway to develop its claims (para. 61).

The terms of CERD

Article 1

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 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.

Whether “national origin” encompasses “current nationality”

Based on its characterization of Qatar's claims, the Court determined that the ground of "national origin" in CERD did not encompass current nationality.

Though CERD pre-dated the Vienna Convention on the Law of Treaties the Court treated the elements of the article 31 and 32 analysis as embodying customary international law. It thus examined the text, the context and the object and purpose of CERD and other relevant interpretive materials. It also consulted the practice of the CERD Committee and regional human rights courts.

The Court first held that the text of CERD referred to "origins" in the sense of a person's bond to a national or ethnic group at birth, like other characteristics in CERD such as race. It noted that nationality is a legal attribute and can change over a person's lifetime. This interpretation reflected the arguments of UAE. Qatar had argued that the characteristics in the Convention need not be immutable and that a narrow interpretation of "national origin" could disguise discriminatory acts even on the other grounds in CERD under the guise of current nationality. Further, it had argued that paragraphs 2 and 3 of article 1 of CERD that created exceptions for citizenship distinctions would be meaningless if current nationality were not covered.

The Court then focused on the context of "national origin" in paragraphs 2 and 3 of article 1 of CERD and held that they were meant to clarify the point that distinctions based on current nationality were not covered by CERD.

Interestingly, the Court noted that paragraph 2 allowed a State to make any "distinctions, exclusions, restrictions or preferences" between citizens and non-citizens. This would encompass the right to create a travel ban based on nationality. However, as Qatar argued, this provision would be necessary only if CERD prohibited distinctions based on current nationality (para. 83). Further, paragraph 3 allows legislation "concerning nationality" - presumably as in the travel ban - as long as it does not discriminate against a particular one.

The Court then considered the object and purpose of CERD. It determined that the object of the Convention was to bring an end to debate about hierarchies among social groups based on characteristics associated with their birth origins (para. 86). It also noted that the fact that the 182 states parties to the Convention commonly differentiated between persons based on citizenship clearly showed a practice that CERD did not prohibit distinctions based on nationality.

Thus, the Court concluded that the ordinary meaning of "national origin," read in context and according to the object and purpose of CERD, did not encompass current nationality.

Though the Court noted that it was not bound to consider supplementary means of interpretation because of this conclusion, the Court went on to consider the *travaux préparatoires*, which showed that "national origin" did not include current nationality. The Court said that it would engage in this otherwise unnecessary step, because of the detailed analysis given it by the parties and its own practice to confirm its interpretation of the text (para. 89). Its review revealed that early discussion leading to the treaty involved considered protecting "nationality," but only in a sociological sense

where a state was composed of a number of nationalities. But the discussions and drafts that followed did not continue this discussion and did not include nationality in a “political-legal” sense but focused on “foreign origins” (paras. 93-5). The Court summarized by finding that the result of its examination showed that paragraphs 2 and 3 “provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States’ legislation on nationality” (para. 96).

The Court side-stepped the finding by the CERD Committee that Qatar’s communication was admissible by saying that it had come to its own conclusion that “national origin” did not include current nationality (para. 101). Though the Committee had applied its constant practice concerning differences of treatment based on nationality discussed in its General Recommendation XXX and wrote at para. 63 of its decision in this case, Qatar v. UAE, that it therefore had had subject-matter competence in a matter involving nationality. Thus, it had jurisdiction to examine:

- whether the differences impugned before it pursue a legitimate aim,
- are proportional to the achievement of that aim,
- do not result in a denial of fundamental human rights of non-citizens, and
- comply with paragraph 3 that the distinction does not discriminate against a particular nationality.

While noting that it had ruled that it will “ascribe great weight” to a treaty committee’s interpretation of its treaty, the Court noted in this case that it was not bound by it and in this case had applied the customary rules of treaty interpretation and come to its own conclusion (para. 101).

The Court also distinguished the jurisprudence of regional human rights courts on the basis that these courts were interpreting provisions that assured the rights and freedoms in the regional human rights instruments to all without distinction based on national or ethnic origin, rather than providing substantive protection against discrimination on that ground (para. 104).

Corporations

The Court held that the Convention did not apply to corporations. The reference to “institutions” meant groups of individuals (para. 108).

Indirect discrimination

The Court finally dismissed the allegations of indirect discrimination made by Qatar. Though the Court asked itself whether any of the impugned measures alleged resulted in discrimination on the ground of national origin in purpose or effect, the only explanation for the outcome is that it concluded that any indirect discrimination alleged here was based on current nationality and therefore not on a ground that would engage CERD.

Having determined that the travel ban and expulsion order were based on nationality and so were not based on national origin, the Court went on to consider whether those and other measures resulted in indirect discrimination against persons based on their Qatari national origin (para. 111).

Qatar attempted to show that these measures resulted in indirect discrimination in a number of ways. Qatar alleged, for example, that the expulsion order and travel ban indirectly discriminated against persons of Qatari “national origin” in the “historical-cultural sense”, namely persons of Qatari birth and heritage, including their spouses, children and others linked to Qatar. It added that UAE official statements critical of Qatar, UAE’s criminalizing expressions of sympathy for Qatar, and UAE’s failure to supress anti-Qatari hate speech were all comprehensive and serious acts resulting in discrimination against Qataris in the historical-cultural sense, particularly based on their traditions, culture or dress.

While noting that CERD prohibited “all forms and manifestations of racial discrimination” resulting from the purpose or effect of State action, the Court came to the narrow conclusion that although the impugned 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 residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention” (para. 112). The measures did not constitute racial discrimination against Qatari “as a distinct social group on the basis of their national origin” (para. 112).

Finally, the Court wrote: “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” (para. 112). It was thus without subject matter jurisdiction.

The Dissents

Five judges wrote dissenting reasons.

President Yusef wrote a Declaration disagreeing with the majority decision. He argued that the majority mischaracterized Qatar’s claim which was based on national origin as simply one of current nationality despite the emphasis in the pleadings that they were claims of racial discrimination on the ground of national origin (paras. 2, 10). He also argued that the indirect discrimination argument, which focused on the factual effects of the impugned measures on persons of a socio-cultural Qatari national origin distinct from Emiratis was not something that could be disposed of without an examination of those facts (para. 14).

Judge Sebutinde dissented because he saw no need for the Court to depart from its earlier finding that some of Qatar’s claims could constitute racial discrimination and that both the issue of the content of “national origin” and the claims of indirect discrimination required an analysis of the facts (para. 22).

Judge Bhandari’s dissent actually explored the meaning of national origin in CERD. It meant a connection to a country or nation that might be long-standing or historical and defined by ancestry or descent (*jus sanguinis*). This was especially in the case of Qatari where nationality is based on parentage so that nationality coincides with national origin and is just as immutable (paras. 10-1). He was also of the opinion that the exceptions to legislated distinctions based on citizenship in paragraphs 2 and 3 called for their narrow reading to achieve CERD’s goal of eliminating racial

discrimination (para. 15). He read the travaux as showing that states merely wanted to reserve certain rights to their citizens (para. 19). He concluded his dissent by stating that national origin encompassed current nationality (para. 20). He thought that the Court should have accorded more weight to the CERD Committee General Recommendations and that accordingly the aim and proportionality of UAE's measures raised an issue under CERD (paras. 28-30).

Judge Robinson ventured to state that Qatar was right in claiming that national origin includes distinctions based on current nationality (para. 6). In reasoning similar to Judge Bhandari, he notes that the vast majority of individuals who acquire their citizenship from ancestry, like those of Qatar and the Emirates, will spend the rest of their lives with their birth nationality whether they remain at home or reside in another country (like the Qatari residents of UAE) (para. 8). He too argued that paragraphs 2 and 3 would be meaningless if current nationality were not encompassed by national origin (para. 11). He was particularly concerned that the cursory attention given by the Court to the CERD Committee's General Recommendation's emphasis on the proportional use of exceptions to protections such as offered by CERD deserved examination on the merits (para. 17). He also argued that Qatar's claim of indirect discrimination did not turn on the issue of current nationality, but rather the factual impact of UAE's measures on anyone with cultural ties to Qatar or who identified with Qatari national traditions (paras. 24-5). The uncontradicted evidence that Qataris were a 'distinct social group' suggested that the impugned measures affected them on the basis of their national origin and not just their nationality (para. 27).

Judge Iwasawa agreed with the majority that national origin did not encompass current nationality (para. 2). However, he argued that the claim of indirect discrimination should proceed on the merits. Indirect discrimination, meaning measures not necessarily aimed at a particular group, may be discriminatory if they have an "unjustifiable disproportionate prejudicial impact" on a protected group, in this case, based on race (paras. 51, 55). He noted that Qatar had to prove such an impact on them based on their national origin and UAE had to prove that it was based on nationality requiring "extensive factual analysis" as the 'very subject-matter of the dispute" (paras. 64-6). He objected to the fact that the majority had determined the factual dispute at the preliminary objections phase of the proceedings (para. 67).

Conclusion

By excluding current nationality from the ground of "national origin", the Court gave a very narrow reading to that term. Although statelessness remains a dreadful problem, generally, for most people in the world, their current nationality is their "national origin". Thus, excluding nationality from "national origin" may allow for much disguised or indirect discrimination. Even though CERD is aimed at racial discrimination, it is clear that the states parties ratified or acceded on the basis that an aspect of nationality – "national origin"- rightly needed protection as a matter of race.

Paragraph 2 of article 1 allows distinctions between citizens and non-citizens but clearly makes this a dichotomy. Qataris were not complaining here of refusal of UAE passports, refused to all but UAE

citizens. CERD is meant to operate at the international level where states are the main legal players. But this is a dichotomy: a state may restrict some benefits to its citizens. All non-citizens may be excluded. Paragraph 3 clearly is founded on this dichotomy between citizens and non-citizens: states may legislate on matters of "nationality, citizenship or naturalization" as long as they do not "discriminate against any particular nationality". That is what happened to the Qatari: those of Qatari nationality were subject to travel bans, among other measures.

One commentator has remarked on the very real difficulty created by a divergence in interpretation of a treaty term between the Court and the expert treaty body created by article 8 of CERD. The Committee noted at para. 49 in Qatar v. UAE that the non-binding recommendations before it should not be the basis for discontinuing proceedings before the ICJ that is capable of producing a legally binding judgment. But what effect does this have on the coherence in treaty law? Was the Committee deferring to the ICJ power to interpret the treaty because it could make binding rulings? Another commentator criticized the Court for not referring some of its assumptions about the ground of "national origin" to a hearing on the merits, such as its being based on "inherent characteristics" and for not examining the idea that "race is a social construct". However, if the issue before the Court had reached the merits, it would have been about racial discrimination against Qatari, not about the assumptions embedded in the legal interpretation of a ground of discrimination.

The Court accepted the concept of indirect discrimination or discrimination by effect (paras. 111-2). The Court notes that some of the measures complained of "may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or of family members of Qatari citizens residing in the UAE", this did not constitute indirect discrimination. Defining current nationality out of the ground of "national origin" seems to mean that these effects do not count.

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