

## **The Divergence Between the ICJ and the Committee on the Elimination of Racial Discrimination regarding Nationality-Based Discrimination**

### **Introduction**

The February 2021 decision of the International Court of Justice (ICJ) in the *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case brought by Qatar against the UAE (*Qatar v. UAE CERD case*) contained a surprise in the preliminary objections judgment: the ICJ disagreed with the Committee on the Elimination of Racial Discrimination (CERD Committee) as to whether the Convention on the Elimination of Racial Discrimination (CERD) covered nationality-based discrimination. Setting aside the question of whether the ICJ was right to so easily disregard the views of the Committee charged with interpreting the CERD and whether this decision was appropriate at the preliminary objections phase, the Court's holding throws into doubt whether the CERD can be applied to nationality-based discrimination in the future, which in turn impacts other pending cases and a long list of domestic policies worldwide. This *Insight* identifies the reasons for this disagreement between the ICJ and CERD Committee in the context of nationality-based discrimination under human rights law.

### **The Qatar v. UAE CERD Case**

This case grew out of a dispute between Qatar and a number of other states in the Gulf region, including the UAE, that alleged Qatar was sponsoring terrorism. Qatar denied that

it was doing so. In order to induce Qatar to change its policies, the states in the region imposed a variety of measures, including expelling Qatari nationals. Qatar adopted a multi-prong legal strategy to reverse these measures, approaching several courts and international organizations with a variety of claims. In the claim that Qatar submitted to the ICJ, it argued that the UAE was violating the CERD because the measures targeted Qatari nationals on the basis of their nationality.

In the preliminary objections judgment, the Court held that the CERD did not prohibit discrimination on the basis of nationality. “Nationality” as such does not appear in the text of the Convention, though “national origin” does. The Court viewed an individual’s “current nationality”<sup>1</sup> as a changeable political characteristic,<sup>2</sup> out of line with the other listed characteristics in the CERD of “race, colour and descent.” In contrast, “national origin” in the CERD did not cover citizenship. Instead, “national origin” meant “a person’s bond to a national or ethnic group at birth”<sup>3</sup> which is “inherent” and cannot change.<sup>4</sup> Thus, the Court viewed the concept of “national origin” in the CERD as a characteristic more similar to the other listed characteristics and not political allegiance or the “legal attribute” of nationality.<sup>5</sup> After all, the CERD preamble framed the objective of the Convention as an effort to combat colonization and theories of racial superiority.<sup>6</sup> In addition, the Court relied on article 1(2) of the CERD which states: “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”<sup>7</sup> This text appears to directly exclude nationality-based discrimination from the scope of the CERD. The Court also relied on the CERD preparatory works to point out that the distinction between national origin and nationality had been discussed in the negotiations on the CERD. In the Court’s view, a proposed amendment that would have exempted nationality from the meaning of “national origin”<sup>8</sup> had only been withdrawn because article 1(2) was added, thereby bolstering its view that the drafters did not intend the CERD to include discrimination on the basis of nationality.<sup>9</sup> In any event, the Court noted that nationality discrimination was widespread and therefore unlikely to have been included.<sup>10</sup>

### **The Views of the CERD Committee**

The CERD Committee, on the other hand, had previously concluded the opposite. In *General Recommendation 30*, the Committee acknowledged that there was a nuanced overlap of nationality and national origin as concepts.<sup>11</sup> Nonetheless, the Committee concluded that “national origin” in the CERD included nationality. The Committee noted that “xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of

discriminatory, xenophobic and racist practices.”<sup>12</sup> It also observed the reality that many persons “lived all their lives on the same territory” and yet nevertheless suffer discrimination if they could not or were prohibited from “establish[ing] the nationality of the State on whose territory they live.”<sup>13</sup>

While the Committee took note of the same article 1(2) text as the ICJ, it also noted another paragraph in the CERD that expressly prohibited discrimination against any particular nationality, which is a form of nationality-based discrimination.<sup>14</sup> That being said, the Committee acknowledged that some nationality-based discrimination measures could be adopted when they were proportionate to a legitimate government aim, such as a voting restrictions on foreigners.<sup>15</sup>

Interestingly, while the ICJ saw nationality as a somewhat easily changeable political status, the CERD Committee appears to view nationality as both central to a person’s identity and, in most cases, a largely fixed status based on immutable birth or descent, and a part of a person’s inheritance of membership in a political community.

### **Nationality-Based Discrimination in Human Rights law**

What went unsaid in the ICJ case is that most other human rights instruments that prohibit discrimination include nationality-based discrimination, and that it would be remarkable for the CERD to deviate from this trend. A few treaties prohibit nationality discrimination explicitly, such as the Migrant Workers Convention.<sup>16</sup> More commonly, it is implicitly covered. When treaties prohibit discrimination, they list the various protected characteristics that are deemed invalid bases for differential treatment. Usually, this includes, *inter alia*, national origin or social origin discrimination, as well as any “other status,” so that they achieve their objective of prohibiting discrimination “of any kind.”<sup>17</sup> Because of the close overlap of national origin and nationality, and the objective of prohibiting all discrimination, most human rights treaties have been interpreted to include nationality-based discrimination either as a part of “national origin” or at least in the residual category of “other status.”<sup>18</sup> In addition, some human rights treaties expressly make distinctions between citizens and non-citizens, which confirms that the states were very much aware of the issue of nationality-based discrimination.<sup>19</sup> While these other instruments do permit certain exceptions, even where discrimination is not specifically exempted states may only discriminate on the basis of nationality if the measures are proportionate to a legitimate government aim.<sup>20</sup> For the CERD not to cover nationality-based discrimination in the same way as its fellow human rights treaties would be unusual. Indeed, the CERD Committee’s approach is far more in alignment with general trends in human rights practice than the ICJ’s.

## Conclusion

At this point, the international community is left with two contrary interpretations of the CERD, and on a critical issue no less of nationality-based discrimination. Despite a consistent interpretation that other anti-discrimination instruments also prohibit nationality-based discrimination and a decision of the CERD Committee on point, the ICJ has held that the CERD is uniquely distinct and does not include nationality. The ICJ's decision thus exists awkwardly in the field of human rights. One might be tempted to simply dismiss it as clearly incorrect but for the ICJ's prominence in international law. More critically, the ICJ cannot be so easily dismissed because it is on track to hear a number of other CERD cases, such as the current case pending between Armenia and Azerbaijan.<sup>21</sup>

As of yet, the CERD Committee has not responded to the ICJ's judgment. Alongside the ICJ case, Qatar filed a parallel application with the CERD Committee making the same claims as it did before the ICJ. The Committee appointed an *ad hoc* Conciliation Commission as per its rules.<sup>22</sup> While this might appear to present the perfect chance to reaffirm its views in light of the ICJ's judgment, while that process was underway Qatar, the UAE, and other states involved in the dispute settled their differences and suspended the proceedings.<sup>23</sup> Without an active case, neither the Conciliation Commission nor the Committee will speak on the issue, although they do have the narrow option of issuing a general recommendation, perhaps one clarifying *General Recommendation 30*.

**About the Author:** William Thomas Worster teaches public international law and international migration law at The Hague University of Applied Sciences, in The Netherlands. This *Insight* draws on this author's article "Discrimination on the Basis of Nationality Under the Convention on the Elimination of Racial Discrimination," forthcoming in the *Pace International Law Review*.

---

<sup>1</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment on Preliminary Objections (Feb. 4, 2022), <https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf> [hereinafter Qatar v U.A.E. Judgment on Prelim. Objs.].

<sup>2</sup> *Id.* ¶ 88.

<sup>3</sup> *Id.* ¶ 81

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* ¶ 86.

---

<sup>7</sup> *Id.* ¶ 82 (citing International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX) (Dec. 21, 1965), 660 U.N.T.S. 195 (C.E.R.D.), art. 1(2)).

<sup>8</sup> Qatar v U.A.E. Judgment on Prelim. Objs., *supra* note 1, ¶ 96.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* ¶ 87 (“Differentiation on the basis of nationality is common and is reflected in the legislation of most States parties.”)

<sup>11</sup> CERD Comm, *General Recommendation XXX on discrimination against non-citizens* (2005), ¶ 5

<sup>12</sup> *Id.* at preamble.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 1.

<sup>15</sup> *Id.* ¶¶ 3-4.

<sup>16</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, 2220 U.N.T.S. 3 (Dec. 18, 1990) art. 1(1)

<sup>17</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) at 71, art. 2; International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171 (Dec. 16, 1966), arts. 2(2), 26; International Covenant on Economic, Social and Cultural Rights, 999 U.N.T.S. 3 (Dec. 16, 1966), arts. 2(2), 14.

<sup>18</sup> For the ICCPR, see *Gueye et al. v. Fr.*, Comm’n No. 196/1985, Views (Hum. Rts. Comm., Apr. 3, 1989) ¶¶ 9.4-9.5; *Sipin v. Est.*, Comm’n No. 1432/2005 (Hum. Rts. Comm., July 9, 2008) ¶ 7.2.

For the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, E.T.S. No. 5 (Nov. 4, 1950) *as amended*, arts. 1, 14, see *Menesson v. Fr.*, App. No. 65192/11 (June 26, 2014), ¶¶ 97-99; *Gaygusuz v. Aust.*, App. No. 17371/90 (Sep. 16, 1996), ¶¶ 42-43; *Andrejeva v. Lat.*, App. No. 55707/00, (Feb. 18, 2009), ¶ 87; *Bah v. UK*, App. No. 56328/07 (Sep. 27, 2011), ¶ 45; *C v. Belg.*, App. No. 21794/93 (Aug. 7, 1996), ¶ 37-38; *Koua Poirrez v. Fr.*, App. No. 40892/98 (Dec. 30, 2003), ¶¶ 36-42.

For the American Convention on Human Rights, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 (Nov. 22, 1969), arts 1(1), 13(5), 22(8), 24, see *Jurid. Cond. & Rts of the Undoc. Migrants*, Adv. Op. OC-18/03 (Sep. 17, 2003), ¶¶ 85, 89, 118-22, 133-36; Proposed Amends. to the Natlization Provs. of the Const. of C. Rica, Adv. Op. OC-4/84 (Jan. 19, 1984) ¶¶ 52-62.

<sup>19</sup> See, e.g., ICCPR, *supra* note 15 at art. 13 (permitting states to discriminate against foreign “citizens” in matters of admission and expulsion); art. 25 (also permitting discrimination against non-citizens for political participation, such as voting and holding public office).

<sup>20</sup> Hum. Rts. Comm., *General Comment 15: The Position of Aliens Under the Covenant* (1986), ¶ 5; *A v. Austl.*, Comm’n No. 560/1993 (Apr. 1997), ¶¶ 9.3-9.4.

<sup>21</sup> See *generally* Appl. of the Int’l Conv. on the Elim. of All Forms of Racial Discrim. (Arm. v. Azer.), Prov. Meas. [Req. by Arm.], Order (Dec. 7, 2021), <https://www.icj-cij.org/public/files/case-related/180/180-20211207-ORD-01-00-EN.pdf>.

<sup>22</sup> See *Qatar v. U.A.E.*, Juris. of the Inter-st. comm’n, U.N. Doc. CERD/C/99/3 (Aug. 30, 2019); *Qatar v. U.A.E.*, Admiss. of the Inter-st. comm’n, U.N. Doc. CERD/C/99/4 (Aug. 30, 2019).

<sup>23</sup> *Qatar v. UAE*, Dec. on the req. for suspens. submitted by Qatar (Mar. 15, 2021), [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1\\_Global/Decision\\_9381\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/Decision_9381_E.pdf).