

International Court of Justice — Provisional measures — *Prima facie* jurisdiction — International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (“CERD”) — Article 22 — Whether the Court having *prima facie* jurisdiction *ratione materiae* — Distinction between “national origin” and “nationality” under CERD — Whether procedural preconditions to the Court’s jurisdiction met — Prior negotiation — Exhaustion of CERD-based procedures — Plausibility — Whether the acts of which Qatar complained were plausibly acts of racial discrimination — Irreparable prejudice — Urgency — Whether evidence submitted by Qatar proving that the rights claimed were under a real and imminent risk of irreparable prejudice — Reports of international organizations as evidence — Unilateral undertaking — Statement of 5 July 2018 by UAE

International Court of Justice — Provisional measures requested by respondent State — Whether extending to protection of procedural rights — Procedural rights arising under Article 22 of CERD — Right to obtain compliance with provisional measures indicated earlier — *Prima facie* jurisdiction — Provisional measures for non-aggravation and non-extension of the dispute — Whether capable of being indicated only if provisional measures for protection of rights also indicated

International Court of Justice — Preliminary objections — Whether Court having jurisdiction under Article 22 of International Convention on the Elimination of Racial Discrimination, 1965 — Whether discrimination based on nationality prohibited by CERD — Whether Qatar’s claim of discriminatory measures by United Arab Emirates falling within scope of CERD Treaties — Interpretation — Scope — International Convention on the Elimination of Racial Discrimination, 1965 — Article 1(1) — Meaning of “national origin” — Whether including current nationality — Object and purpose of treaty — *Travaux préparatoires* — Whether CERD intending to prohibit discrimination based on nationality — Whether Qatar’s claim of discriminatory measures by United Arab Emirates falling within scope of CERD

Human rights — International Convention on the Elimination of Racial Discrimination, 1965 — Article 1(1) — Meaning of “national origin” — Whether including current nationality —

**Whether discrimination based on nationality prohibited by CERD
 — Whether Qatar’s claim of discriminatory measures by United
 Arab Emirates falling within scope of CERD**

**Nationality — Nature of citizenship — Bond between State and
 citizen — Whether distinct from “national origin” — International
 Convention on the Elimination of all Forms of Racial
 Discrimination, 1965, Article 1**

**International tribunals — United Nations Committee on the
 Elimination of Racial Discrimination — Weight to be given to
 practice of Committee — Jurisprudence of regional human rights
 courts — Relevance — Whether discrimination based on national-
 ity prohibited by CERD**

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

(QATAR *v.* UNITED ARAB EMIRATES)¹

International Court of Justice

First Request for Provisional Measures. 23 July 2018

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna,
 Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford,
 Gevorgian, Salam, *Judges*; Cot, Daudet, *Judges ad hoc*)

Second Request for Provisional Measures. 14 June 2019

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna,
 Cançado Trindade, Donoghue, Gaja, Bhandari, Robinson,
 Crawford, Gevorgian, Salam, Iwasawa, *Judges*; Cot, Daudet,
Judges ad hoc)

Preliminary Objections. 4 February 2021

¹ A list of counsel participating in the proceedings appears at para. 10 of the Order on Provisional Measures of 23 July 2018, para. 11 of the Order on Provisional Measures of 14 June 2019 and para. 20 of the judgment on Preliminary Objections of 4 February 2021.

For related proceedings before the United Nations Committee on the Elimination of Racial Discrimination, see 203 ILR 562 below.

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(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa, *Judges*; Cot, Daudet, *Judges ad hoc*)²

SUMMARY:³ *The facts:*—On 5 June 2017, the United Arab Emirates (“UAE”) issued a statement breaking off diplomatic relations with Qatar. Qatari nationals in the UAE were given fourteen days in which to leave and no further Qatari nationals were permitted to enter the UAE. UAE nationals were likewise banned from remaining in Qatar and from travelling to, or transiting through Qatar. UAE airspace and seaports were closed for all Qataris within twenty-four hours. Qatari means of transport were prohibited from crossing, entering or leaving the territory of the UAE. Qatar claimed that this statement and the ensuing actions of the UAE violated rights guaranteed under the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (“CERD”).

On 11 June 2018, Qatar filed an application instituting proceedings against the UAE, alleging violations of CERD. On the same day, Qatar also filed with the Court a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the International Court of Justice 1945 (“the Statute”).

Order on First Request for Provisional Measures (23 July 2018)

Qatar maintained that Article 22 of CERD conferred on the Court *prima facie* jurisdiction to indicate provisional measures. Qatar contended that a dispute existed between the Parties on the interpretation and application of CERD, as the measures implemented since 5 June 2017 discriminated against Qatari citizens on the basis of their nationality in a manner contrary to various provisions of CERD. Qatar argued that the measures taken by the UAE interfered, *inter alia*, with the right to marriage, freedom of expression, the right to medical care and the right to education. The UAE maintained that no dispute existed between the Parties on the interpretation and application of CERD. According to the UAE, all Qataris enjoyed in the UAE all fundamental rights guaranteed under CERD. The UAE contended that there had been no restriction on access to courts, education and medical care by Qataris. Moreover, the UAE argued that “national origin” under Article 1 of CERD was not to be equated with “present citizenship”, but was rather a reference to “ethnic origin”.

Qatar argued that, before filing the case with the Court and as required under Article 22 of CERD, it had both made genuine attempts at finding a

² In the first Request for Provisional Measures of 23 July 2018 and Preliminary Objections of 4 February 2021, Judge ad hoc Daudet was appointed by Qatar and Judge ad hoc Cot was appointed by the United Arab Emirates under Article 31 of the Statute.

³ Prepared by Dr M. Lando.

negotiated solution to the dispute, and deposited a communication with the United Nations Committee on the Elimination of Racial Discrimination (“the CERD Committee”) in accordance with Article 11 of CERD. Qatar added that whether the two preconditions to the Court’s jurisdiction were alternative or cumulative was not to be decided at the provisional measures stage of the proceedings. According to the UAE, the two preconditions were cumulative and that Qatar did not make a genuine attempt at finding a negotiated solution. Moreover, the UAE argued that, once a communication had been deposited with the CERD Committee, Qatar had to await the exhaustion of that procedure before seising the Court, which it failed to do.

Qatar contended that the rights allegedly breached by the UAE’s measures were those under Articles 2, 4, 5, 6 and 7 of CERD.⁴ According to Qatar, such rights were plausible, and CERD could not be read so as to exclude protection against discrimination based on nationality. In support of its plausibility argument, Qatar submitted the December 2017 report of the Technical Mission despatched by the Office of the United Nations High Commissioner for Human Rights (“OHCHR”). The UAE contended that Qatar had put forward an unacceptably broad interpretation of the rights arising under CERD, and that, as a consequence, the rights asserted by Qatar were not plausible. The UAE also stated that the OHCHR Technical Report on which Qatar relied was dated, having been finalized seven months before the events of which Qatar was complaining before the Court. Qatar maintained that there was a link between the rights claimed on the merits and the provisional measures requested. According to the UAE, the real aim of Qatar’s request for provisional measures was to overturn the measures of 5 June 2017, and the measures requested by Qatar were not linked to the rights claimed under CERD.

According to Qatar, without provisional measures it would not be possible to restore the *status quo ante*, should the Court find that the UAE had committed the breaches alleged by Qatar. It followed that there was a real and imminent risk of irreparable prejudice to the rights claimed by Qatar under CERD. According to Qatar, the durable consequences of the alleged breaches by the UAE had been acknowledged by the OHCHR Technical Report. The UAE argued that Qataris continued to enjoy, on the territory of the UAE, all rights protected under CERD. The UAE contended that there had been no steps taken in pursuance of the measures of 5 June 2017 to deport Qataris. The UAE stated that the only restriction implemented was on the entry of Qataris into the UAE, for which permission was to be sought, and almost always granted in practice. The UAE added that a dedicated hotline had been created. As a result, there was no real and imminent risk of irreparable prejudice to the rights claimed by Qatar on the merits.

Held:—(1) (by eight votes to seven, Judges Tomka, Gaja, Bhandari, Crawford, Gevorgian, Salam and Judge ad hoc Daudet dissenting) The

⁴ For the text of Articles 2, 4, 5, 6 and 7 of CERD, see para. 50 of the Order of 23 July 2018.

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UAE had to ensure that: (i) families separated by the measures were reunited; (ii) Qatari students affected by the measures were given the opportunity to complete their education in the UAE, or to obtain their educational records if they wished to continue their studies elsewhere; and (iii) Qataris affected by the measures adopted on 5 June 2017 were allowed access to tribunals and other judicial organs of the UAE (para. 79).

(2) (by eleven votes to four, Judges Crawford, Gevorgian, Salam and Judge ad hoc Cot dissenting) Both Parties were to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

(a)(i) The Court could indicate provisional measures only if, *prima facie*, there appeared to be a basis for jurisdiction over the merits of the case. There was a dispute between the Parties regarding the interpretation and application of CERD, since they disagreed on the scope of the measures and on whether they related to rights and obligations under CERD. The acts of which Qatar complained were capable of falling within the scope *ratione materiae* of CERD. It was not necessary to determine, at this stage in the proceedings, whether discrimination based on “national origin” encompassed discrimination based on “nationality” under the terms of CERD (paras. 14-27).

(ii) In order to meet the precondition of prior negotiation, negotiations had to relate to the subject-matter of the dispute between the Parties. Qatari officials had raised issues relating to the measures of 5 June 2017 in international fora. In a letter to the UAE’s Foreign Ministry dated 25 April 2018, Qatar had referred to alleged violations of CERD, in a way which amounted to an offer to negotiate the settlement of the dispute between the Parties. Moreover, on 8 March 2018 Qatar had deposited a communication with the CERD Committee. Accordingly, the Court did not need to decide, at the provisional measures stage of the proceedings, whether the two procedural preconditions to the Court’s jurisdiction under Article 22 of CERD were cumulative or alternative. Similarly, it was not necessary for the Court to decide whether the *electa una via* principle and *lis pendens* principle were applicable in the present case. It followed that the Court had *prima facie* jurisdiction over the merits of the case (paras. 36-40).

(b) There was a correlation between respect for individual rights, the obligations of States Parties to CERD and the right of such States to seek compliance with those obligations. Since Articles 2, 4, 5, 6 and 7 of CERD protected individuals from racial discrimination, a State could invoke the rights guaranteed under those provisions only if the acts complained of appeared to constitute acts of racial discrimination. The UAE measures targeted only Qataris and were directed at all Qataris present in the UAE without regard to individual circumstances. It followed that some of the rights asserted by Qatar under CERD were plausible. A link existed between the rights claimed by Qatar under CERD and the provisional measures requested (paras. 51-9).

(c) Certain rights claimed by Qatar under CERD were susceptible of suffering irreparable prejudice. As a result of the measures of 5 June 2017,

the situation of Qataris in the UAE remained vulnerable in respect of their rights under Article 5 of CERD. The evidence suggested that: numerous Qataris residing in the UAE had been forced to leave their place of residence without possibility of return; UAE-Qatari mixed families had been separated; Qatari students in the UAE had been deprived of the opportunity to complete their education; and Qataris had been denied equal access to the UAE's courts. The prejudice which people in such situations could suffer could be considered to be irreparable. The UAE had not taken any official step to repeal the measures. It followed that the rights invoked by Qatar were under a real and imminent risk of irreparable prejudice (paras. 67-71).

(d) The conditions for indicating provisional measures were met, but the provisional measures ordered by the Court did not need to be identical to those requested. In addition to the measures indicated in the operative paragraph, the circumstances of the case were such as to warrant the indication of a provisional measure aimed at preventing the extension or aggravation of the dispute between the Parties (paras. 72-6).

Joint Declaration of Judges Tomka, Gaja and Gevorgian: In indicating provisional measures, the Court should have established whether the dispute between the Parties *prima facie* fell within the scope *ratione materiae* of CERD. Nationality was not listed in Article 1(1) of CERD as a basis on which discrimination was prohibited under CERD. "National origin" could not be equated with "nationality", as was clear from the *travaux préparatoires* of CERD. The CERD Committee had not stated that "national origin" was to be equated with "nationality". The dispute which Qatar had submitted to the Court did not *prima facie* fall within the scope *ratione materiae* of CERD, and the rights claimed by Qatar on the merits were therefore not plausible (paras. 1-7).

Separate Opinion of Judge Cançado Trindade: (1) The principle of equality and non-discrimination lay at the heart of CERD. However, the Parties in the proceedings diverted the Court's attention from this principle to points of no relevance to provisional measures under a human rights treaty. International legal doctrine had similarly not dedicated sufficient attention to this principle. Nonetheless, the jurisprudence of the Inter-American Court of Human Rights determined significant advances in the approach to equality and non-discrimination, stating that they were part of *jus cogens* (paras. 9-19).

(2) The present case also concerned the arbitrariness of certain measures taken allegedly in breach of CERD. Positive law alone could not solve the problems resulting from the arbitrariness inherent in human nature. Law and justice were indissociable. In the dehumanized world of our days, the Court had a mission to contribute to a humanized law of nations (paras. 22-8).

(3) The rule on exhaustion of local remedies should not have been mentioned at the provisional measures stage of the proceedings, as it

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constituted an issue of admissibility of the claim. Exhaustion of local remedies did not have, in the context of human rights protection, the same application as it had in the context of diplomatic protection. Exhaustion of local remedies in human rights protection was victim-oriented, and its rationale was to provide redress. One could not deprive a human rights treaty of *effet utile* by applying the rationale of exhaustion of local remedies of diplomatic protection (paras. 48-55).

(4) The attempt to create the plausibility requirement for indicating provisional measures was regrettable. The Court had not elaborated on what plausibility meant. Provisional measures should have been focused on human beings in situations of vulnerability (paras. 57-60).

(5) The provisional measures indicated by the Court were necessary to protect persons in situations of vulnerability. Human beings in situations of vulnerability were the ultimate beneficiaries of the provisional measures indicated, as subjects of the humanized international law of our times. Provisional measures had a properly tutelary dimension, and not only a precautionary one (paras. 68-73).

(6) An autonomous regime of provisional measures was being developed, which enhanced the preventive dimension of international law. The basic components of this regime were the rights to be protected, the corresponding obligations and the prompt determination of responsibility (paras. 75-6).

(7) The fact that the present case was an inter-State one did not mean that the Court should have reasoned on a strictly inter-State basis. The case was not about the rights of States, but about the rights of human beings. This aspect should have characterized the Court's approach to the request for provisional measures (paras. 94-5).

Dissenting Opinion of Judge Bhandari: The Court should not have indicated provisional measures in the circumstances. The UAE had made unqualified statements before the Court that the measures of 5 June 2017 had not been implemented, and Qatar had not provided cogent evidence to the contrary. After the closure of oral proceedings, the Foreign Ministry of the UAE had made an unqualified undertaking that Qataris already present in the UAE could remain without need for permission. As result of the unilateral undertaking by the UAE, the rights claimed by Qatar on the merits were not under a real and imminent risk of irreparable prejudice. Relevant cases suggested that, in order for an undertaking to remove the real and imminent risk of irreparable prejudice, such an undertaking had to be unqualified (paras. 1-7).

Dissenting Opinion of Judge Crawford: (1) Article 1(1) of CERD distinguished between discrimination based on "national origin", prohibited under CERD, and discrimination based on "nationality", not prohibited as such. Therefore, the discrimination stemming from the measures of 5 June 2017 was not apparently covered by CERD (para. 1).

(2) It was unclear from the evidence that the measures of 5 June 2017 were still in effect, or that they could cause irreparable prejudice to the rights asserted by Qatar on the merits. No apparent administrative or legislative action was taken to implement those measures. On 5 July 2018, the UAE Foreign Ministry issued a statement clarifying the entry and residence requirements for Qataris. The evidence showed that, also due to the clarifying statement of 5 July 2018, there was no real and imminent risk of irreparable prejudice to the rights claimed by Qatar. Qatar's request for provisional measures failed on the facts (paras. 2-17).

Dissenting Opinion of Judge Salam: The Court did not have *prima facie* jurisdiction *ratione materiae* to indicate provisional measures, as CERD did not prohibit discrimination on the grounds of nationality. In previous cases, the Court had made decisions relating to discrimination on the grounds of ethnic origin, not of national origin, and, as a consequence, had no occasion to decide whether “national origin” is the same as “nationality”. The distinction between “national origin” and “nationality” was confirmed by the *travaux préparatoires* of CERD. Its lack of *prima facie* jurisdiction did not prevent the Court from stating, in the reasoning of the Order, that the Parties should not extend or aggravate the dispute (paras. 2-10).

Dissenting Opinion of Judge ad hoc Cot: (1) The plausibility test as framed by the Court was an invitation to applicant States to enter into the merits of the case heard at the provisional measures stage. In cases under CERD, the Court's jurisprudence acknowledged that the Court had to satisfy itself that the acts complained of were plausibly acts of racial discrimination. A number of overlaps existed between the relief requested on the merits and the provisional measures requested by Qatar. It was therefore unclear whether indicating provisional measures would have prejudiced the merits (paras. 5-12).

(2) The rights under Articles 2, 4, 5(a), 5(d)(v), 5(d)(viii), 5(e)(i) and 6 of CERD could not suffer irreparable prejudice, as the *status quo ante* could have been restored in their respect. Even if there had been a risk of irreparable prejudice, that risk was not imminent. Moreover, there existed a presumption that the UAE were acting in good faith in complying with their obligations under CERD (paras. 17-28).

Order on Second Request for Provisional Measures (14 June 2019)

On 22 March 2019, the UAE filed with the Court a request for the indication of provisional measures under Article 41 of the Statute. The UAE maintained that such measures were necessary to preserve the procedural rights of the UAE and prevent Qatar from further aggravating or extending the dispute between the Parties.

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The first provisional measure requested that Qatar immediately withdraw its communication to the CERD Committee. According to the UAE this measure was necessary to preserve procedural fairness for the UAE, to protect its right to present its case before the Court, and to ensure the proper administration of justice. According to the UAE, it had a right not to be compelled to defend itself in two parallel proceedings concerning the same subject-matter and the same Parties. Qatar contended that the procedure before the CERD Committee was neither duplicative, nor abusive. Qatar added that the UAE had not shown that it possessed plausible rights under CERD which were in danger of irreparable damage and that the issues raised by the UAE were questions for the jurisdiction and admissibility phase of the proceedings.

The second provisional measure requested that Qatar immediately desist from hampering UAE efforts to help Qatari citizens. The UAE contended that Qatar's actions impaired its ability to comply with the Order on provisional measures of 23 July 2018. The UAE also maintained that Qatar was fabricating evidence in order to create the misleading impression that the UAE was effectively imposing a travel ban on Qatari citizens. Qatar denied any fabrication of evidence. According to Qatar, even assuming that Qatar were hampering compliance with the Order on provisional measures of 23 July 2018, there were other means by which the UAE could have complied with that Order. Qatar also stated that the issues raised by the UAE in this connection concerned the merits of the case, and were not a matter for provisional measures.

The third and fourth provisional measures requested by the UAE concerned the non-aggravation and non-extension of the dispute between the Parties. The UAE argued that Qatar's national bodies, such as the National Human Rights Committee, and Qatar's State-owned media, were disseminating false information and accusations relating to the dispute pending before the Court. On this basis, the UAE requested the Court to order Qatar to stop such dissemination. Qatar maintained that non-aggravation and non-extension of the dispute was not a standalone basis for indicating provisional measures. Qatar added that the Court, in its Order on provisional measures of 23 July 2018, had already indicated that the Parties had to avoid aggravating or extending the dispute. Qatar thus argued that the request for provisional measures by the UAE in relation to non-aggravation and non-extension of the dispute were without object. Qatar also stated that the issues relating to this request were matters for the merits phase of the proceedings.

Held:—(1) (by fifteen votes to one, Judge ad hoc Cot dissenting) The request for provisional measures by the UAE was rejected.

(a) The duty of the Court to satisfy itself that it had *prima facie* jurisdiction applied irrespective of whether the request for provisional measures had been made by the applicant or by the respondent. There was no reason to depart from the earlier decision of the Court that it had *prima facie* jurisdiction (paras. 15-16).

(b)(i) At this stage of the proceedings, the Court was called upon to determine whether the rights claimed by the UAE were plausible, having taken into account the basis for the Court's *prima facie* jurisdiction. Moreover, such rights had to have a sufficient link with the subject-matter of the proceedings on the merits (para. 18).

(ii) The first provisional measure requested by the UAE did not concern a plausible right under CERD, as it concerned the interpretation of the compromissory clause in Article 22 of CERD. Consistently with the Order of 23 July 2018, there was no need to decide, at this stage of the proceedings, whether the *electa una via* and *lis pendens* principles were applicable. The second provisional measure requested by the UAE did not concern a plausible right under CERD. This measure instead related to obstacles to the implementation of the Order of 23 July 2018, which would be more appropriately examined at the merits phase of the proceedings. The third and fourth provisional measures were measures for the non-aggravation and non-extension of the dispute, which could have been indicated only if the Court had also indicated provisional measures for the protection of specific rights of the Parties (paras. 25-8).

Declaration of Vice-President Xue: The third and fourth provisional measures requested by the UAE were covered by the Order of 23 July 2018, which was a sufficient reason to reject them. However, stating that the Court might not indicate provisional measures solely for the non-aggravation and non-extension of the dispute could unduly limit the Court's power to indicate provisional measures in the future. While provisional measures generally aimed at ensuring the sound administration of justice, in international dispute settlement the Court also contributed to the maintenance of international peace and security. In situations in which resort to armed force was threatened, the Court not only had a power, but a duty to indicate provisional measures. In such cases, a provisional measure for the non-aggravation or non-extension of the dispute could be necessary. The clarification in the present Order on provisional measures was too big a step, which could tie the Court's hands in the future (paras. 2-8).

Joint Declaration of Judges Tomka, Gaja and Gevorgian: The Court lacked *prima facie* jurisdiction over the merits of the case filed by Qatar. The dispute did not fall within the scope *ratione materiae* of CERD. In relation to its *prima facie* jurisdiction, the Court should also have analysed whether the rights claimed by the UAE were based on CERD (para. 2).

Separate Opinion of Judge Abraham: (1)(a) The Court did not need to address the issue of *prima facie* jurisdiction in this Order, as it had found that one of the requirements for the indication of provisional measures had not