

**JURISPRUDENTIAL DISSECTION OF QATAR V. UNITED ARAB
EMIRATES-INTERNATIONAL COURT OF JUSTICE: A CRITICAL
STUDY**

- Subash P¹

Abstract:

“Racial discrimination is one of the most invidious forms of discrimination”.

- Judge Iwasawa

Human dignity is one of the basic conceptualisation in international human rights treaty law. Simply, the ultimate aim of life is to have dignified existence. Dignity of human being is being violated in many ways and means including racial discrimination. This is recognised in a *lex specialis* regime i.e. International Convention on the Elimination of All Forms of Racial Discrimination, 1965. The main question of law or question for judicial interpretation is that whether nationality is included in the prohibited ground of ‘national origin’ in Article 1 of the Convention. To note, the International Convention on the Protection of the Rights of Migrants Workers and Members of Their Families explicit listed ‘nationality’ as a prohibited ground of discrimination. So, this case needs analysis to find out whether scope of the Convention includes ‘nationality’ in the prohibited ground of racial discrimination or not. For convenience, this work focuses on stage by stage development of this case. It also uses the individual Judges opinions to evaluate the provisional order and merit judgment.

Key Words: Racial Discrimination, nationality, national origin, Qataris.

1. Introduction:

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In 2018, certain events were unfolded in the Grande Salle de Justice of the Peace Palace, Netherland i.e. the World Court or the International Court of Justice (**Hereinafter referred to as the 'ICJ'**). The rift between the Gulf Council States resulted in a series of three cases filed before the ICJ including *the case concerning International Convention on the Elimination of All Forms of Racial Discrimination* (**Hereinafter referred to as the 'CERD'**).² To note, this is the third case before the ICJ dealing with the application or interpretation of the CERD.³ The ICJ performs international judicial function for its being the principal judicial organ and one of the principal organs of the United Nations (**Hereinafter referred to as the 'UN'**).⁴

The developments after 5 June 2017 severely affected the friendly relations between Qatar and the other Gulf member States.⁵ The friendly relationship is one of the foundational principles of modern international law and it reflected in the Charter of the United Nations and Friendly Declaration.⁶ It provides for smooth and stable international conduct and relations among States. The CERD is a pioneering human right treaty law of universal character and occupies a prominent place in the Laws of the United Nations.⁷ The case laws of the CERD Convention disclose the centrality of human being in our contemporary international law.⁸ Thus, it is evident that inter-State outlook of traditional international law is shifting towards people centered international law. This article exclusively deals with the case between Qatar and the United Arab Emirates (**Hereinafter referred to as the 'UAE'**).

² Refer, Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2 of the International Air Services Transit Agreement (Bahrain, Egypt and the United Arab Emirates v. Qatar), Judgment of the ICJ, 14 July 2020; Appeal Relating to the Jurisdiction of the ICAO Council under Article under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and the United Arab Emirates v. Qatar), Judgment of the ICJ, 14 July 2020 and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Judgment of the International Court of Justice, 4 February 2021.

³ See, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objection, ICJ, 1 April 2011; 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 Objection, Judgment, ICJ, 8 November 2019 and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objection, International Court of Justice, 4 February 2021.

⁴ Refer, Charter of the UN, art. 7 and 92; The Statute of the ICJ, art. 1.

⁵ The Gulf Cooperation Council is established by the Charter of Cooperation Council for The Arab States of the Gulf between the six Gulf States. They are as follows: (1) The United Arab Emirates; (2) The State of Bahrain; (3) The Kingdom of Saudi Arabia; (4) The Sultanate of Oman; (5) The State of Qatar and (6) The State of Kuwait.

⁶ Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations established by the UNGA Res. 2625 (XXV) of 24 October 1970. The ultimate aim of friendly relations is to achieve universal peace and to perpetuate it *id est* perpetual peace.

⁷ Separate Opinion of Judge Trindade, Qatar, PM (1), pp. 21, para. 66.

⁸*Ibid.*

2. Background of the Case:

The Gulf Cooperation Council is a regional collective political and economic union in the Arabian Peninsula. There was a general rift between the Gulf Countries due to certain alleged sponsoring terrorist activities by Qatar in the regional proximity. The Council is of the view that the conduct of Qatar likely to push the region into a stage of unpredictable adverse consequences. Also, the failure of Qatar to uphold the Riyadh Agreement made the GCC to take stringent action against Qatar.⁹ In consequent to this, Saudi Arabia and Bahrain severed diplomatic ties with Qatar followed by blockade of land, sea and air routes in the Gulf area against Qatar.

On 05 June 2017, the UAE based on the decision taken in the GCC to maintain security and stability in the GCC region issued a notification calling the Qatari nationals to return to Qatar. The NGO Reports confirmed the unnecessary human suffering due to the measures taken by the UAE and other Gulf States. On 8 March 2018, State communication was made to the CERD Committee in accordance with Article 11 (1) of the CERD which provides admissibility of inter-State communication.¹⁰ On 11 June 2018, Qatar instituted a case against the UAE before the ICJ concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.¹¹ On the same day, it requested for the indication of provisional measures before the Court in pursuant to Articles 41 and 48 of the Statute of the ICJ and Articles 73, 74 and 75 of the Rules of the Court (**Hereinafter referred to as the 'Rules'**). To

⁹ See generally, <https://www.ejiltalk.org/what-are-the-riyadh-agreements/> (Last accessed on 09/06/2021). The regional agreements are accessible on <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280527ea2> and <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280527eaf> (Last accessed on 10/06/2021).

¹⁰ Decision on the admissibility of the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, United Nations, doc. CERD/C/99/4, paras. 53-63.

¹¹ It is one of the nine core international human rights treaty laws. They are as follows: (1) International Convention on the Elimination of All Forms of Racial Discrimination established by the UNGA Res. 2106 (XX) of 21 December 1965; (2) International Covenant on Civil and Political Rights established by the UNGA Res. 2200A (XXI) of 16 December 1966; (3) International Covenant on Economic, Social and Cultural Rights established by the UNGA Res. 2200A (XXI) of 16 December 1966; (4) Convention on the Elimination of All Forms of Discrimination against Women, established by the UNGA Res. 34/180 of 18 December 1979; (5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment established by the UNGA Res. 39/46 of 10 December 1984; (6) Convention on the Rights of the Child established by the UNGA Res. 44/25 of 20 November 1989; (7) International Convention on the Protection of all the Rights of All Migrant Workers and Members of their Families established by the UNGA Res. 45/158 of 18 December 1990; (8) International Convention for the Protection of All Persons From Enforced Disappearance, 2006 and (9) Convention on the Rights of Persons with Disabilities, 2006.

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note here, there was a narrow voting pattern in provisional measures stage i.e. 8:7. This shows the diverging views in the internal judicial deliberations and reasoning of the Judges.

However, the ICJ rejected this case based on the preliminary objections raised by the UAE. This case is based on methodological issues and challenges of substantive interpretation of the Article 1 of the CERD i.e. whether the term ‘national origin’ includes ‘nationality’.¹² There are six dissenting Opinion and 5 pronounced by Judges from former colonies.¹³ Judge Bhandari and Robinson noted the failure of the ICJ not to ascribe great weightage to the jurisprudence of the CERD Committee which is the guardian of the CERD. The *Ahmadou Sadio Diallo case* held ‘ascribing great weightage’ to the supervisory human right body establishes clarity, consistency and legal security.¹⁴

3. Stage of Provisional Measures-Autonomous Legal Regime:

The ultimate aim of provisional measures is to preserve the respective rights of the parties till the final adjudication of the case. The Court will render provisional measures, if the plausibility test is answered in affirmative.¹⁵ Also, an effective link must exist between the rights for which protection is sought and the requested provisional measures.¹⁶ Article 41 of the Statute empowers the Court to avoid irreparable prejudice to the rights which are the subject-matter of the case.¹⁷ To note, there must be an element of urgency i.e. it should be a real and imminent risk to the rights of the parties.¹⁸ This condition of urgency is fulfilled, when the act likely to cause irreparable prejudice at any moment before the Court decides on the merit.¹⁹

Qatar pleaded the Court to indicate to the UAE, *inter alia*, to cease and desist from all conducts of racial discrimination through the instrumentality of State and persons under the direction and general control of the State; To stop violating rights under the CERD; To suspend collective

¹² See, Geir Ulfstein, Who is the Final Interpreter in Human Rights: the ICJ v. CERD?, Blog of the European Journal of International Law, accessible at <https://www.ejiltalk.org/who-is-the-final-interpreter-in-human-rights-the-icj-v-cerd/> (last accessed on 03/07/2021).

¹³*Ibid.*

¹⁴*Ibid.*

¹⁵ 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), Provisional Measures, ICJ, 8 November 2019, p. 126, para. 63.

¹⁶*Ibid.* para 64.

¹⁷ Jadhav (India v. Pakistan), Provisional Measures, ICJ, 18 May 2017, p. 243, para. 49.

¹⁸ *Ibid.* p. 242, para. 50.

¹⁹ Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, ICJ, 7 December 2016, p.1169, para. 90.

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expulsion and entry ban into UAE on the basis of Qatari national origin; To stop racial hatred or discrimination against Qataris including anti-Qatari statements and caricature publications; To suspend laws that punishes Qataris for showing solidarity and sympathy for Qatar under its Federal Decree-Law No. (5) of 2012; To protect the freedom of expression of Qataris in the UAE including media corporations; To reunite families separated due to the expulsion order; To ensure the continued medical treatment of Qataris in the UAE; To allow Qataris students to complete their education in the UAE or somewhere else; To desist from discriminatory measures affecting the property and livelihood rights of Qataris in the UAE; To ensure the Qataris are granted equal treatment in the Courts and Tribunals of the UAE; To stop aggravating the disputes further and complicating the dispute settlement and finally to abstain for other measures prejudice the Qataris rights in the UAE.

Qatar placed its jurisdictional basis on its own right as well as *parens patriae* of its citizens under Article 36 (1) of the Statute and Article 22 of the CERD. It requests the Court that the UAE through the instrumentality of State and persons under its general direction and control has violated Articles 2, 4, 5, 6 and 7 of the CERD. Also, it alleged four counts against UAE in the provisional measure as well as in the preliminary objection proceedings. They are as follows:

1. It expelled the Qataris on collective basis from its territory and prohibited the entry of all Qataris into its territory based on 'Qatari national origin'.²⁰
2. Violating other fundamental rights, including the right 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 tribunal;²¹
3. Failing to condemn eliminate racial hatred and instead it encouraged it against Qatar and Qataris. Also, it failed to combat prejudices against Qatar, *inter alia*, criminalizing the expression of sympathy towards Qatar, promoting and financing an international anti-Qatar public and social media campaign, silencing Qatari media and calling for physical violence against Qatari entities.²²

²⁰ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, 4 February 2021, pp. 6, para.2.

²¹*Ibid.*

²²*Ibid.*

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4. Failed to provide effective protection and remedies to Qataris to seek redressal of their grievances through court and tribunals.²³

In furtherance of the request, it also pleaded the Court to order the UAE to immediately stop and revoke all discrimination measures employed against the Qataris national origin, its entities, to publicly denounce racial discrimination and to take effective steps to eliminate it, to restrain from further discriminations, to restore the rights of Qataris in the UAE and finally to provide assurances and guarantees of non-repetition of this illegal conduct of the UAE.

3.1. *Prima Facie Jurisdiction:*

The Court will order the requested provisional measures only if the requesting party is able to prove that the Court has *prima facie* jurisdiction. Hence, the Court is not required to find it in concrete terms. The *prima facie* jurisdiction can be found out from the provisions relied by the Applicant State.²⁴ In this case, Qatar relied upon Article 36 (1) of the Statute and Article 22 of the CERD. Both the States are parties to the CERD without reservation.

Article 36 of the Statute states:

“The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and convention in force”.²⁵

Article 36 clearly empowers the State parties to the Statute to institute a case in the ICJ by three ways. They are (1) Reference of the case by the parties to the ICJ; (2) If it is provided under the Charter of the United Nations and (3) If it is provided in the treaties and conventions in force between the parties.

Article 22 of the CERD states:

“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 procedure 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”.

²³*Ibid.*

²⁴ Jadhav (India v. Pakistan), provisional measures, ICJ, p. 236, para. 15.

²⁵ Statute of the International Court of Justice, 1945, art. 36 (1).

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Firstly, there must be a dispute regarding the interpretation or application of the CERD. Secondly, if the dispute is not settled by negotiation or by other procedure provided in the Convention then either party can resort to the ICJ. Finally, it provides that if the parties mutual agree to use other modes of dispute settlement, then the compulsory clause of ICJ jurisdiction can be suspended until the outcome of the chosen mode. It is also known as principle of choice of parties as to dispute resolution.

The plain reading of Article 22 makes clear that the Court's jurisdiction is conditional upon the existence of a disputes regarding interpretation or application of the provision of the CERD. A dispute is said to be exist, when States hold opposing views regarding the performance or non-performance of treaty obligations.²⁶ Also, the claim of the Applicant must be positively opposed by the Respondent.²⁷ So, the mere opposing view about the applicability of the Convention cannot be a sole ground to determine the existence of a dispute.²⁸ In this case, Qatar invoked the compromissory clause in the CERD. So, the Court needs to find *outprima facie jurisdiction*. Finally, the Court found out the existence of dispute as to the interpretation of the CERD and held that it has *prima facie jurisdiction* in this case. The Court left to decide whether the alleged acts fall under the scope of racial discrimination as provided in Article 1 (1) of the CERD to the preliminary objection proceedings.

The Court held that Qatar told steps to solve the dispute by negotiation but it was failed because the UAE not responded to the negotiation offered by Qatar. The Court viewed that the negotiation is distinct from mere protest or disputation and require a genuine attempt from the disputing parties.²⁹ The subject matter of the provisional measures must be related to the dispute and in turn related to the substantial obligation under the Convention invoked.³⁰ The Court denied the UAE's claim of non-exhaustion of local remedies in the provisional measure stage. The Court considered it is not necessary to find whether the precondition under Article 22 is alternative or

²⁶ 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), Provisional Measures of the ICJ, P. 115, para. 22.

²⁷ South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objection, ICJ, P. 328.

²⁸ Refer, Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, ICJ, p.1159, para. 47.

²⁹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Judgment, International Court of Justice, p. 17, para 36.

³⁰ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objection, ICJ, 1 April 2011, p. 133, Para. 161.

cumulative and also the applicability of *electa una via* principle and the *lis pendens* in the provisional measures stage.³¹ The Court left to determine the disputing interpretation of ‘national origin’ to the merits.

Article 1 of the CERD provided:

“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”.³²

The words ‘distinction’, ‘exclusion’, ‘restriction’ or ‘preferences’ are the ways and means of racial discrimination. The prohibited grounds are race, colour, descent, national origin and ethnic origin. If discrimination is based on above grounds which nullify or impair the human rights and fundamental freedoms being recognized, enjoyed and exercised on par with fellow nationals in public life, then such acts and omissions are prohibited.

The UAE argued that the term ‘national’ is connected with ‘ethnic origin’. So, the term ‘national origin’ which do not include ‘nationality’. Any alleged discriminatory acts and practices based on nationality falls outside the scope of the Convention. It is explicitly permitted by the Convention itself to differentiate between nationals and non-nationals in the territory of the State Party under Article 1 (2) of the CERD.

Article 1 (2) of the CERD provides:

“This Convention shall not apply to distinction, exclusion, restriction or preferences made by a state party to this Convention between citizen and non-citizens”.³³

Qatar placed its strong reliance on the 2017 Report of the Technical Mission of the Office of the United Nations High Commissioner for Human Rights which concluded that the measures taken by the UAE had “a potential durable effect on the enjoyment of the human rights and

³¹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Judgment, International Court of Justice, p. 18, para. 39

³² Refer, International Convention on the Elimination of All Forms of Racial Discrimination, 1965, art. 1 (1)

³³ *Ibid.*

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fundamental freedom of the Qatars".³⁴ It also strongly relied on the General Recommendation XXX of the CERD which provided that the Convention applies to discriminatory conduct based on Qatari national origin or nationality.

To end this unnecessary humanitarian crisis, the UAE demanded the State of Qatar to align militarily, politically, socially and economically with the Arab and Gulf Countries as a precondition to lift its discriminatory policies towards Qatar.³⁵ This may amount to intervention in the external affairs of the State of Qatar.

The Court noted the correlation between respect for individual rights, the obligation under CERD and the rights of States parties to seek compliance of that obligation.³⁶ Further, the Court noted that Articles 2, 4, 5, 6 and 7 intended to protect people from racial discrimination, only if, the alleged act fall under the term 'racial discrimination' under Article 1 (1) of the CERD.³⁷ The Court particularly noted that clauses of Article 5(a), (d) and (e) are capable of causing irreparable prejudice to the rights of the parties.³⁸

On 5 June 2017, the UAE ordered all Qatars to immediately leave from its territory and gave only 14 for their departure. Thus, the individuals are forced to leave their own place of residence without the possibility of return could based on the circumstances may amounts to serious risk or irreparable prejudice.³⁹ The Court is of the view that the request for provisional measures amounts to real risk of irreparable prejudice, only if the situation is not possible to restore status quo ante.⁴⁰

Based on the requested measures and the circumstances, the Court viewed that the rendered measures need not be identical to the requested measures. Finally, the Court indicated the

³⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, ICJ, p. 21, para. 47.

³⁵ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, ICJ, p.27, para. 64

³⁶ 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), Provisional measures, ICJ, p. 135 para. 81

³⁷ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, ICJ, p. 24, para. 52.

³⁸ 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), Provisional Measures, ICJ, p. 138, para. 96.

³⁹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, ICJ, p. 396, para. 142.

⁴⁰ Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, ICJ, p. 1169, para. 90.

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provisional measure to reunite the separated families; to allow students to complete their education in the UAE or to complete elsewhere; to make effective step to allow access to justice and non-aggravation of the dispute considering the circumstances of the case. The Court reaffirmed that its provisional measures are binding and create international legal responsibility to whom it is addressed. Also, this order of provisional measures is not to be considered as prejudging the issues at hand.⁴¹ The parties are free to raise the question of jurisdiction or admissibility in the merits or in the preliminary objection proceedings.

3.2. Individual Opinions:

Judge *Ad Hoc* Cotin his dissenting opinion held that the measures requested are not imminent and it is restorable.⁴² Even if, the request seems to be prejudice, it is not imminent in the present case. He noted that it is on par with the case of execution of death penalty or nuclear test. He touches upon the principle of good faith in his reasoning but not deliberated. The condition of urgency must be evaluated by means of timescale. The request and the claim are overlapping and amounts to prejudging the issues at hand.⁴³ So, he opined that the request must be rejected.

Judge (Late) James Crawford in his dissenting opinion held that the conditions of provisional measures are not met. Moreover, the alleged acts are not covered under the CERD, the sole reliance for jurisdiction. He viewed that the collective expulsion of Qatars is unlawful under international law.⁴⁴ The evidences submitted by Qatar not enough to prove the continuation of human suffering on the date of filling of the case. The Court failed to test the evidentiary value to support Qatar's claim under Article 5 of the CERD. He observed that one of the roles of the ICJ is the peaceful settlement of disputes and if states exhibit their willingness to solve disputes, it must be encouraged. He viewed that the measures order is not objectionable *per se* but ought not to be ordered.⁴⁵

⁴¹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, ICJ, P.31, para. 78.

⁴² Dissenting Opinion of Judge Ad Hoc Cot, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, p.5, para. 19.

⁴³ *Ibid*, p. 4, para. 12.

⁴⁴ Dissenting Opinion of Judge James Crawford, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, p.1, para.1.

⁴⁵ *Ibid*, p.6, para. 18.

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Judge Dalveer Bhandari in his dissenting opinion showed his disapproval in rendering the provisional measures. He noted the Declaration of the UAE is neither enforced nor implemented.⁴⁶ So, the risk of irreparable prejudice is not apparent. It is noteworthy that the unilateral declaration in any stage of the proceeding can create international legal obligation.⁴⁷ Similarly, other ICJ caselaws were discussed to prove the obligation created by statements or understandings pronounced before the Court.⁴⁸ Thus, the jurisprudence of the Court indicates that to remove irreparable prejudice, the undertaking or commitment must be unqualified.⁴⁹ The existence of urgency is fundamentally fact dependent. If there is no irreparable prejudice, there is no urgency. Urgency is the attribute of irreparable prejudice.

Judge Salam in his dissenting opinion held that there is no *prima facie* jurisdiction because the dispute falls outside the CERD. The conjoint reading of Article 1 (1) of the CERD and Article 31 of the VCLT does not cover the nationality within the scope of racial discrimination as envisaged by the CERD. The connection between decolonization and racial discrimination can be seen in the preamble. There is no general prohibition of discrimination in the CRED, example religion.⁵⁰ The general prohibition of discrimination is provided under Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966. Judge Salam noted the two prior cases under CERD before the ICJ and these cases concern with ethnic origin. This is the first case questioning whether 'national origin' is included within the scope of 'nationality' under Article 1(1) of the CERD.

Judge Salam illustrated the difference between the conflicting interpreting of the term 'national origin' with the following example: "The case of American citizens of Japanese origin who were incarcerated following the attack on Pearl Harbor during the Second World War. Despite having

⁴⁶ Dissenting Opinion of Judge Bhandari, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, P. 2, para. 3.

⁴⁷ Ibid, pp. 2, para 4. See generally, Nuclear Test Case (Australia v. France), provisional measures, p. 267, para. 43. Nuclear Test Case (New Zealand v. France), provisional measures, p. 472, para. 46.

⁴⁸ Question relating to the Obligation to prosecute or Extradite (Belgium v. Senegal), provisional measures, ICJ, P. 154, para. 68. Also see, Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, ICJ, p. 156, para. 38.

⁴⁹ Dissenting Opinion of Judge Bhandari, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, pp. 4, para. 7.

⁵⁰ Dissenting Opinion of Judge Salam, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, p. 2, para. 3 (d).

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American nationality, these citizens were subject to racial discrimination based on their 'national origin', not their nationality, and were rounded up and held in War Relocation Camps".⁵¹

In the Joint Declaration by Judges Tomka, Gaja and Gevorgian underlined the grave humanitarian crisis unfolded in the UAE and they acknowledged the existence of the rights of mixed family, educational right of students and access to justice in the UAE. They observed that the *prima facie* jurisdiction should fall within the scope of the treaty. Also, the rights pleaded to be protected in provisional measures should be plausibly. This Convention enumerated the prohibited grounds of racial discrimination. Thus, the claim of Qatar falls outside the ambit of the CERD. The two terms are not identical and synonymous.⁵² If 'nationality' is included then the Convention has far-reaching consequence in protecting foreigners' human rights. Finally, the Judges noted that the act of the UAE is inconsistent with other rules of international law but Qatar exclusively relied on the CERD. However, they did not define the other rules of IL.

Judge Trindade in his Separate Opinion noted the invocation of human rights instruments confirm the era of adjudication of human rights before the ICJ. The Court acknowledged the contribution by the regional human rights Courts and the constant contribution made by the supervisory organs of human right treaty law.⁵³ He observed that the operation of regional human rights system within the framework of universality of human rights.⁵⁴ There is a common mission of contemporary international tribunals towards the realization of justice. He traced the fundamental principle of equality and discrimination as a main pillar of the CERD. He strongly criticized the 'plausibility of rights' and 'plausibility of admissibility'. He viewed that human suffering is more compelling ground for rendering the provisional measures.⁵⁵ Also, the test of plausibility of rights is an unfortunate judicial innovation and plausibility of admissibility is another unfortunate attempt to create precondition for rendering provisional measures.⁵⁶

⁵¹*Ibid*, P. 2-3, para. 5.

⁵² Joint Declaration of Judges Tomka, Gaja and Gevorgian, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, p.2, para. 4.

⁵³ Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, ICJ, pp. 29, para. 67-68.

⁵⁴ Separate Opinion of Judge Trindade, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), ICJ, P. 4.

⁵⁵*Ibid*, pp. 23, para. 23.

⁵⁶*Ibid*, pp. 19, para. 57.

The positive law cannot resolve international crisis at times. So, law and justice should go together. The right to access should be *lato sensu*. Epistemologically, the correct understanding is the universally acknowledged interrelatedness and indivisibility of all human rights.⁵⁷ The rule of exhaustion of local remedies is different for diplomatic protection and human right protection.⁵⁸ Provisional measures are endowed with tutelary character and jurisdictional guarantee of a preventive dimension.⁵⁹ The CERD contains rights of individuals and obligations from States. So, Qatar invoked the compromissory clause as a collective guarantee of rights under CERD. Thus, any interpretations which rise preconditions are not amenable.⁶⁰ Any interpretation must be in line with object and purpose of the CERD. He viewed that *punctum pruriens judicii* was the proper understanding of the compromissory clause. It is necessary to keep in mind the nature and substance of the human right treaty.⁶¹ Also, he discussed the temporal dimension of provisional measures and State voluntarism. He strongly supports the trend of humanization of contemporary international law. In his jusnaturalist thinking, he notes the origin and evolution of law in the framework of *Civitas maxima gentium* and universality of humankind.⁶²

4. Second Provisional Measures:

On 22 March 2019, the UAE requested for the indication of provisional measures to preserve its procedural rights, equal opportunity to present its case and for proper administration of justice.⁶³ It pleaded that it has a right not to defend in parallel proceedings before the ICJ and the CERD Committee. However, the Court rejected the request due to lack of plausibility. Also, it held that it cannot indicate 'non-aggravation of disputes' on a standalone basis.⁶⁴ However, in the *case of legality of Use of Force* between Yugoslavia and UK, the ICJ indicated not to aggravate the disputes, even though it lacked *prima facie* jurisdiction.⁶⁵

⁵⁷*Ibid*, pp. 11, para. 31.

⁵⁸*Ibid*, pp. 17, para. 49. Effect remedies in human rights protection and redress in diplomatic protection

⁵⁹*Ibid*, pp. 23, para. 73.

⁶⁰*Ibid*, pp. 20, para. 61.

⁶¹*Ibid*, pp. 20, para. 62.

⁶²*Ibid*, pp. 8, para. 20.

⁶³Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Provisional Measures (II), 14 July 2019, P.11, para. 19.

⁶⁴*Ibid*, p.12, para. 24; p. 13, para. 28.

⁶⁵Legality of Use of Force (Yugoslavia v. UK), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), p. 839, para. 37,40, 41.

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To note, the UAE pleaded four provisional reliefs from the Court. They are (1) To withdraw its communication made to the CERD Committee in accordance with Article 11; (2) To unblock website which facilitate Qataris returning back to the UAE blocked by the Qatar; (3) To stop national bodies and funded media outlets aggravating the disputes further and (4) Non-aggravating of dispute.

4.1.Individual Opinion:

Vice-President Xue in her Declaration noted the usefulness of incidental proceedings in due administration justice and effective settlement of disputes. The Court as a principal judicial organ and one of the principal organs of the UN contributes to the maintenance of international peace, security and legal order in accordance with the principles of justice and international law. The Court has ‘power’ and ‘duty’ to indicate provisional measures for the purpose of due administration of justice.⁶⁶ She viewed that the measure of non-aggravation cannot be considered secondary. The ultimate goal of judicial settlement of international disputes is the maintenance of international peace and security. The standalone indication of non-aggravation is much debated between the judges.⁶⁷ Since, *the Pulp mills case*, the Court held that the non-aggravation of disputes as an ‘ancillary measure’ for the protection of respective rights of the parties.

Judge Trindade in his separate opinion discussed about a ‘sense of duty’ in the international judicial function. He opined that the second provisional order has unnecessarily generates uncertainties. He used the term ‘faculty of the ICJ’ in indicating the provisional measures. He noted certain inconsistencies with regard to the CERD Convention and the CERD Committee. He argued that the UAE’s request amounts to accepting the *prima facie* jurisdiction but it denies jurisdiction *ratione materiae*. The parallel proceedings based on the same dispute would incompatible with the principles of *electa una via* and *lis pendens*. The UAE claimed abuse of CERD Committee dispute resolution mechanism and created a possibility of conflicting solutions from the Committee and the ICJ. He viewed that the decalage to be bridged between the time of human beings and the time of human justice.⁶⁸

⁶⁶ Frontier Disputes (Burkina Faso/ Republic of Mali), Provisional Measures, 1986, p.9, para. 19.

⁶⁷ Declaration of Vice President XUE, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Provisional Measures (II), 14 July 2019, p. 3, para. 7.

⁶⁸ *Ibid*, p.7, para. 20.

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The importance of provision measures for protecting human rights, rehabilitation and victim centric justice delivery is touched upon. The Court is not sufficiently dealt the paramount question of human vulnerability. The ultimate beneficiaries are human beings and not States in IL. The fundamental principles of equality, non-discrimination and prohibition on arbitrariness establish a balance between human right and State power. These principles are the foundations for the CERD for which proper attention is paid at normative and jurisprudential levels but not in international legal doctrine. He viewed rights under the CERD as fundamental rights. So, he disheartened for labeling these 'fundamental rights' as 'plausible rights'. The new paradigm of humanized international law cannot be denied in this particular case.

Judge Ad Hoc Cot in his dissenting opinion held that the measures requested are at least plausible. He touched upon the applicability of doctrine of *lis pendens*. The UAE pleaded the Court to order Qatar to withdraw its proceedings before the CERD Committee. The status of *lis pendens* in international law is not clear. It is not even provided under the Statute or the Rules of the Court like the principle of *res judicata*. Both the ICJ and the PCIJ never ever affirmed or rejected the applicability of *lis pendens*.⁶⁹ In the *Case of Certain Interest in Polish Upper Silesia*, the PCIJ held that the doctrine of *lis pendens* was not applicable based on three grounds. They are (1) the parties are not same, (2) Actions raised were not identical and (3) The Courts are not identical in character.⁷⁰ These three constitute the essential elements of *lis pendens*. The term 'action' is not clear, whether it includes same legal arguments or same relief sought, so it needs examination. Definitely, the CERD Committee has quasi judicial character. Article 22 of the CERD creates preconditions that must be completed before resorting to the ICJ. Thus, this lay down the 'Convention test for *lis pendens*'.⁷¹ If a treaty provides multiple mode of dispute settlement in an orderly fashion that order must be respected. He viewed that the parallel proceedings may irreparably influence the final decision of the Court or the Committee.⁷² Hence, the Court may either to order suspension of the case before the Committee or under Article 74 (1) of the Rules.

⁶⁹Dissenting Opinion of Judge Ad Hoc Cot, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Provisional Measures (II), 14 July 2019, p.1, para. 3. Also see, Certain German Interest in Polish Upper Silesia, Judgment, PCIJ, P. 20.

⁷⁰*Ibid*, p.2, para. 5.

⁷¹*Ibid*, p.5, para. 14.

⁷²*Ibid*, p. 7, para. 20.

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Judge Ronny Abraham in his Separate Opinion observed that the judicial policy reasons mandates firstly to find out the *prima facie* jurisdiction. He slightly touched upon the principles of procedural fairness and equality between parties to the proceeding. He rejected the UAE's request for want of *prima facie* jurisdiction which is incompatible with the concept of procedural fairness.⁷³ In fact, no parties were arguing lack of jurisdiction at this stage. The meaning of the term 'respective rights of the parties' not defined in Statute or Rules, it may include procedural rights or fairness, right to equality of arms and right to sound administration of justice during the judicial proceedings. He refers to judge Buergenthal's Opinion in the *Pulp mills on the River Uruguay* where he noted that there are two types of provisional measures. There are (1) Those urgent measures due to the risk of irreparable prejudice of harm to the rights which are subject matter of the disputes over which the *prima facie* jurisdiction is established and (2) To prevent a party to a dispute before it from interfering with or obstructing the judicial proceedings by coercive extrajudicial means, unrelated to the specific rights in dispute, that seek or are calculated to undermine the orderly administration of justice in a pending case.⁷⁴ In the present case, the claimed procedural rights are not exposed to any risk and the dispute belongs to merits.

The Joint Declaration of Judge Tomka, Gaja and Gevorgian and Declaration of Judge Salam reiterated their same opinions held in their joint opinion in the first provisional order.

5. Preliminary Objection:

The need to address jurisdiction and inadmissibility question in the preliminary stage itself is imbibed in the maxim *indubio preliminarium eligendum*. The proceeding before the Court is of two types. They are (1) Principal proceeding and (2) Incidental proceeding. Normal course of the case can be suspended by the institution of incidental proceedings like provisional measures, preliminary objection, counter-claim, intervention, special reference to the Court, discontinuance, interpretation and revision. Thus, it is known as 'case within a case'.⁷⁵ The Statute is silent on the aspect of preliminary objection but governed by Article 79 of the Rules of the Court. Preliminary objection can be based on three different grounds. They are as follows:

⁷³ Dissenting Opinion of Judge Abraham, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Provisional Measures (II), 14 July 2019, p. 4, para. 17.

⁷⁴ Declaration of Judge Buergenthal, Case Concerning Pulp Mills on the River Uruguay, (Argentina v. Uruguay), Provisional Measures, ICJ, 23rd January 2007, p.22-23, para. 6.

⁷⁵ Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm & Christian Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed., Oxford University Press, Oxford, 2019, p. 1028, para. 134.

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(1) Lack of jurisdiction, (2) Inadmissibility of the application and (3) Any other objection which is ‘preliminary in character’. The term ‘admissibility’ is not defined in the Rules. Preliminary objection can only be raised within three months from the submission of Memorial. All questions of facts and laws need to be argued in the preliminary objection stage itself. It is advisable for the respondent to file separate preliminary objection rather than in a counter-memorial. This will allow the respondent to shot two chances at these inextricably linked questions.⁷⁶

The UAE raised three preliminary objections. They are (1) The Court lacked jurisdiction *ratione materiae*; (2) Failure of fulfilling the procedural preconditions prescribed under Article 22 of the CERD and (3) Abuse of process of the Court but later withdrew it.

The main dispute is concerning the interpretation whether ‘nationality’ is encompassed within the phraseology ‘national origin’. Qatar alleged racial discrimination against media corporations including Al Jazeera and other outlets in the territory of the UAE is within the prohibited degree of racial discrimination against institutions. So, it is required to find out whether the term ‘institution’ includes artificial persons. The UAE replied that the restriction on media is based on content restriction under the laws of the UAE and it is outside the CERD scope. Further, a Qatar point out that CERD applies not only to measures that are framed as distinctions on the basis of a protected ground but also to acts which has the purpose or effect of racial discrimination.⁷⁷ The UAE accepts that disguised discrimination against members of a protected group would fall within the scope of CERD.⁷⁸ The UAE objected to the claim of indirect discrimination not raised in the Application. The Court agreed that the ‘Rules’ do not preclude Qatar from improving its argument put forth in its Application or new arguments based on the arguments based by the UAE. The subject of the dispute is not limited by the precise wordings of the Application. Thus, the Rules allow some flexibility to develop the allegations as possible as it does not “transform the dispute brought before the Court by the application into another dispute which is different in character”.⁷⁹

5.1.Treaty interpretation:

⁷⁶*Ibid*, pp. 1036, para. 157.

⁷⁷Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p.21, para. 47.

⁷⁸*Ibid*, p. 22, para. 55.

⁷⁹ Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objection, ICJ, p. 319-319, para. 98-99.

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Article 31 and 32 of the Vienna Convention on Law of Treaties, 1969 are customary international law in character and applies even to non-Parties to the VCLT. The Court will interpret the term “national origin” with the elements of Article 31 of the VCLT which laid down the general rule of treaty interpretation. Article 32 provides the supplementary means of interpretation. It is resorted to by the Court to confirm the resultant meaning or to remove ambiguities or obscurity or to avoid a manifestly absurd or unreasonable result.⁸⁰

The Court will scrutinize the practice of the CERD Committee and of regional human rights Courts. The Parties expressed different interpretational opinion on the term ‘national origin’ in Article 1 (1) of the CERD. The Court in its jurisprudence, for the purposes of interpretation has taken into account the relevant practice of human rights treaty-based committees and the practice of regional human rights Courts. The Court’s interpretation must take into account of all these elements as a whole.⁸¹ However, priority must be given to the text of the treaty i.e. textual approach.⁸²

The CERD was drafted in three different stages. They are as follows: (1) Sub-Commission on Prevention of Discrimination and Protection of Minorities; (2) Commission on Human Rights and (3) Third Committee of the UNGA. In fact, the drafters of the Convention knew the difference between ‘nationality’ and ‘national origin’. Though, the term nationality was included in the first draft prepared by the Sub-Commission especially for States consisting of many nationalities within its territory but they removed it before passing the draft to the Commission.⁸³ It agreed, in principle that there are legitimate practices of differential treatment in State practice in international law between citizens and aliens.⁸⁴ The United States and France proposed to the Third Committee of the UNGA to explicitly exclude nationality or citizenship from the context

⁸⁰ Vienna Convention on Law of Treaties, 1969, art. 32, R.P. Anand, *Salient Documents in International Law*, 1st Ed, Banyan Publication, New Delhi, 1994. Also See, *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Preliminary Objections, I.C.J. p. 321, para. 91; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, pp. 109-110, para. 160).

⁸¹ Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objection, I.C.J., 2017, p.29, para. 64.

⁸² Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgement, I.C.J., 1994, p. 22, para. 41.

⁸³ Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, 13-31 Jan. 1964, UN doc. E/CN.4/873, E/CN.4/Sub.2/241, 11 Feb. 1964, p. 46.)

⁸⁴ Explanations provided by Lebanon in presenting the compromise amendment, United Nations, Official Records of the General Assembly, Twentieth Session, Third Committee, Summary Record of the 1307th Meeting, held on 18 October 1965, doc. A/C.3/SR.1307, p. 95, para. 1 (Lebanon).

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of ‘national origin’. However, it was withdrawn in the favour of compromise as provided in Article 1 (2) and (3) of the CERD.

The Commission notes that the term ‘national origin’ denotes not nationality but the ‘*country of origin*’.⁸⁵ The same is confirmed and reaffirmed in the Third Committee. The Court noted that the definition of racial discrimination in the Convention includes ‘national or ethnic origin’. The term ‘origin’ denotes a person’s bond to a national or ethnic group at birth. Therefore, national origin means an individual’s permanent association with a particular State. On the other hand, nationality is an existing legal bond between the person and the State and it can be changed during a person’s lifetime.⁸⁶ To note, differentiation based on nationality or citizenship is found in most of the State laws and proved by state practices in international law i.e. immigration laws and fundamental rights of different States.⁸⁷ Finally, from the ordinary meaning, context and in the light of object and purpose of the CERD, it does not cover nationality within its definitional scope of racial discrimination, even the *travaux préparatoires* confirm this interpretation.

5.2. Object and Purpose of the CERD:

The definitional scope of ‘racial discrimination’ must be assessed in the light of aims, purpose and objectives of the CERD and the treaty as a whole. One of foundational principles of the UN is the principles of human equality and dignity (dignitus hominis). All member States of the UN pledged to take joint and separate actions to promote universal respect and observation of human rights and fundamental freedoms without any discrimination on the ground of race, colour, ethnic origin, sex, language and religion. Non-observation of human rights disturbs peace and harmony among people. It is proclaimed that all human beings are equal before law and also enjoy equal protection of law. The regime of colonialism is based on the irrational and artificial notion of human distinction. They projected racial dominance or supremacy over other race or group of people considered as lower human beings. This doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous and there is no justification for racial discrimination.⁸⁸ Many times, they are not even considered as

⁸⁵ United Nations, Commission on Human Rights, Report on the Twentieth Session, held 17 February-18 March 1964, doc. E/3878, E/CN.4/874, pp. 24-25, para. 85).

⁸⁶ Nottebohm (Liechtenstein v. Guatemala), Judgment, 1955, pp. 20, para. 23.

⁸⁷ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p. 32, para. 87.

⁸⁸ Convention on the Elimination of All Forms of Racial Discrimination, 1965, Preambular recital 5.

humans but as beast of burdens by the colonial masters. Thus, the linkage between Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960 and International Convention on the Elimination of All Forms of Racial Discrimination, 1965 can be found in the preambular part. The existence of racial barriers is repugnant to the ideals of any human society.⁸⁹ Government policy of racial differentiation like apartheid, segregation and separation are denounced throughout the CERD provisions. The general prohibition of discrimination is also acknowledged in the *Convention concerning Discrimination in respect of Employment and Occupation, 1958* and the *Convention against Discrimination in Education*.⁹⁰ To emphasize, discrimination is the genus and racial discrimination is a species of it. The CERD is *lex specialis* human right treaty instrument. To note here, the Court held that the jurisprudence of the regional human rights Court based on *lex generalia* human rights instruments are of little help in the present case.⁹¹

5.3. Practice of CERD Committee:

The General Recommendation XXX of the CERD Committee held that the UAE's general expulsion order amounts to racial discrimination as provided under the CERD. So, Qatar requested the Court to give 'great weightage' to the jurisprudence of the Committee. Also, Qatar argued that discrimination consists of difference in treatment without legitimate justification and without a reasonable relationship of proportionality with the aim to be achieved. Hence, Qatar claimed that this discrimination is not within any CERD exceptions.

The UAE argued that the notion of indirect discrimination in the context of the CERD is more specific than the other human rights treaty law.⁹² Qatar solely refers to measures which are not discriminatory at face value but discriminatory in fact and effect.⁹³ In fact, the CERD prohibits all forms and manifestation of racial discrimination. So, any restriction is said to be racial discrimination which has the purpose or effect of racial discrimination. However, the ICJ held that there is no direct or indirect racial discrimination on the basis of Qatari as a distinct social

⁸⁹Convention on the Elimination of All Forms of Racial Discrimination, 1965, Preambular recital 7.

⁹⁰*Ibid*, Preambular Recital 10.

⁹¹Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p.35, para. 104.

⁹²Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p. 37, para. 110.

⁹³ *Ibid*.

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group based on national origin.⁹⁴ Judge Salam in his Dissenting Opinion to Provisional measures (I) opined that the General Recommendation of the CERD Committee do not amounts to general or subsequent practice under Article 31 (3) (b) of the VCLT.

5.4.Findings of the Court:

Finally, the Court upheld that the first preliminary objection of the UAE as to the jurisdiction under Article 22 of the CERD. The Court considered that it is not necessary to deal with the second objection. Also, the Court noted that when its jurisdiction is challenged on multiple grounds, the Court is “free to base its decision on the ground which in its judgment is more direct and conclusive”.⁹⁵

The Court held that the term ‘national origin’ does not include ‘nationality’. The Second claim that blocking media outlets amounts to racial discrimination as well as violates freedom of free speech and expression. It was denied by the Court because the CERD includes only natural persons within its ambit. The term ‘institution’ includes collective body of persons and not media as raised in this case. The third claim of indirect discrimination was denied because the alleged act falls outside the scope of the CERD.

5.5.Individual Opinion:

President Abdulqawi A. Yusuf in his Declarationopined that the majority wrongly held that the case falls outside the CERD due to mischaracterization of subject matter of the dispute by the Court itself. There is no meaningful determination on the claim of indirect discrimination. The Court outrightly rejected the Qatar claim without analysing its stand point of view. He held that the alleged acts are within the scope of racial discrimination and pointed out the oddness in this judgment that there is no need for the factual assessment on the alleged act in the preliminary objection stage. It is largely on the merit stage for the factual analysis to determine the alleged conduct of the UAE. The Court summarily dismissed this case against its own jurisprudence. The Court cannot simply assert its views on the subject-matter. It should be well based on reasons. A measure may amounts to de facto racial discrimination, if it disproportionate effect on a group

⁹⁴Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p. 37-38, para. 112.

⁹⁵ Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000, p. 24, para. 26; Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p. 17, para. 40; Certain Norwegian Loans (France v. Norway), Judgment, I.C.J. Reports 1957, p. 25).

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having national or ethnic origin regardless of whether that measures was intended or not for that particular nationality. Since, this is a question of fact, it need due analysis in the merits. At the current stage, it is important to find that whether the acts of the UAE are capable of causing adverse impact on the enjoyment of rights of Qataris as provided under CERD.

Judge Julia Sebutindein her dissenting opinion underlined the complex and delicate nature of the dispute. It needs detailed examination of evidences and arguments in merits. She interpreted that the preconditions are not cumulative but alternative in character. So, the parties need not to exhaust the preconditions in Article 22 of the CERD. The role of the Court and the Conciliation Committee under Article 22 are fundamentally different and cannot be equated. The decision of the ICJ is binding and the decision of the Committee is of recommendatory and conciliatory in nature. It is the well established jurisprudence of the Court that the valid title of jurisdiction cannot be questioned as abuse of process, unless otherwise the high threshold of any exception is met.

She observed that at the stage of jurisdictional analysis, the detailed examination and the plausibility of applicant's claim are unwarranted.⁹⁶ She viewed both provisional measures and preliminary objection stages are of same lower threshold. The Court departed from its earlier findings in provisional measures as to plausibility of Article 5. The majority view is not in the line of justice. The satisfaction of preconditions would frustrate the objectives of the Convention as it delays the settlement process of international disputes. She touched upon the principles of *lis pendens* and *electa una via* which means 'he who has chosen one means of dispute settlement, cannot have recourse to another'.⁹⁷ She noted that there is no explicit denial of parallel proceedings under Article 22 as in other international Conventions. So, parallel proceedings are not prohibited per se.⁹⁸

Judge Dalveer Bhandari in his dissenting opinion of the view that measures taken by the UAE is capable of falling within the scope of CERD. The Court need to objectively determine the subject matter of the dispute and pay careful attention to the formulation of disputes in the Application. He read the terms 'national' and 'origin' conjunctively and held it includes

⁹⁶Dissenting Opinion of Judge Sebutinde, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, P.5, para. 14.

⁹⁷*Ibid*, p.10, para. 30.

⁹⁸*Ibid*, p.11, para. 31. Also see, Pact of Bogota, art. IV.

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nationality within its ambit. Also, he held that the views of Qatar and the UAE as to national origin are agreeable but to give progressive interpretation to the human right treaty, the view of Qatar is more agreeable. He touches upon the principle of *jus sanguinis* as prevailing in the Gulf region. The term 'Qataris resident' in the expulsion order includes Qataris origin. Thus, the measure comes with the conventional prohibition of racial discrimination.

Judge Patrick L. Robinson in his dissenting opinion held that the term national origin includes nationality. He placed heavy reliance on the principle of *jus sanguinity* and agreed with the majority that the corporation is outside the Convention. When interpret with the context of the treaty i.e. to eliminate all forms of racial discrimination, the Convention includes nationality within its ambit. It is clear from the expert opinion by Mr. John Peterson that Qataris constitute different racial group and constitute distinct social group.⁹⁹ The jurisprudence of the human rights Committees will promote the achievement of clarity, consistency and legal security. Also, any measures taken to restrict the human rights should be least restrictive measures.¹⁰⁰ He viewed that the term 'indirect discrimination' is misleading and commented four observations on it. They are (1) There must be an effect directly implicate the protected group under the CERD; (2) The alleged acts frequently occur in State practice, (3) The term indirect discrimination undervalue and make it inferior to direct discrimination. It is evident from the Court's unfortunately observation held it as collateral or secondary effect not capable of falling under racial discrimination and (4) Also, it includes disguised discrimination.

Judge Iwasawa Yuji, a Japanese jurist in his separate opinion held that the term national origin is not encapsulated within the term national origin. But, he is of the view that the notion of indirect discrimination may fall under the scope of racial discrimination, if the measures has the effect of causing racial discrimination on the ground of national origin. So, it needs in-detailed analysis in the Merits. So, the first preliminary object should have been rejected on the basis that it does not possess 'an exclusive preliminary character'. He discussed about the human rights of non-

⁹⁹Dissenting Opinion of Judge Robinson, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p. 10, para. 27 and p.6, para. 25. Also see, Memorial of Qatar, Vol. P.131-134. Paras. 3.96-2.100 and vol. VI, Annex-162, Expert Report of Dr. J.E. Peterson of 9 April 2019. He Opined "a distinct people, as a group of individuals who belong to a long-standing historical-cultural community defined by a distinct heritage, particular family or tribal affiliation, shared national traditions and cultural, and geographic ties to the peninsular Qatar".

¹⁰⁰ Dissenting Opinion of Judge Robinson, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p. 4, para 14.

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citizens under international law.¹⁰¹ He touches upon the international minimum standard of treatment of aliens. The commencement of the UN Charter is a momentous movement in the continued expansion of international human rights law.¹⁰² The non-discrimination clause in the International Bill of Rights encompassed a general prohibition to all forms of discrimination albeit with very few exceptions of political and economic rights. Those non-discrimination clauses contain a phrase 'all such' is capable of catching all forms of discrimination into its list of prohibited grounds. Thus, it includes nationality as a ground for non-discrimination. So, the list is not exhaustive but illustrative. On the other hand, the prohibited list under racial discrimination Convention is exhaustive and not illustrative. To note, discrimination is permitted only if the State declared public emergency under Article 4 (1) of the ICCPR. Further, a differential treatment is said to be discriminatory, if it not based on legitimate aim and no reasonable relationship of proportionality between the means employment and aim sought to be achieved. The General recommendation XXX of CERD Committee is also touched upon. So, the measures of the UAE are prohibited under other rules of international law like UDHR, ICCPR and ICESCR. But unfortunately Qatar failed to base its jurisdiction on these inter-related instruments.

The prohibited grounds are in the nature of inherent, immutable and permanent characteristic of individuals.¹⁰³ Since, the term national is attached with ethnic origin, they have close relationship. In this context, 'national origin can be understood as a person's origin from a country or cultural group.¹⁰⁴ Nationality is a changeable or temporary legal bond between the person and the State. He viewed that Article 1 (2) and (3) are not exception but clarifying the definitional scope of racial discrimination. He noted that the CERD Committee has confirmed in its jurisprudence that differentiation of treatment based on nationality does not per se constitute 'racial discrimination'.¹⁰⁵ Sometimes, distinction based on nationality can have effect or purpose of discrimination based on national origin. However, the Court outrightly rejected the claim of

¹⁰¹ Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live, UNGA Res. 40/144 of 13 December 1985. Also see, Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance, September 2001 established in the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa.

¹⁰² Separate Opinion of Iwasawa, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), preliminary Objection, 4th February 2021, p.2, para. 6.

¹⁰³ *Ibid.*, P. 7, para, 28.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, p, 11, para. 43.

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indirect discrimination because the alleged act falls outside the definitional scope.¹⁰⁶ Even though, a rule, measure or policy is neutral at its face but has unjustifiable disproportionate prejudicial impact on a certain CERD protected group constitutes indirect discrimination.¹⁰⁷ Thus, the Court in effect decided merits Judgment in the preliminary objection stage itself.

6. Conclusion:

The Court does not have the power to prevent the parties' engagement in dual or simultaneous proceeding during the Courts proceedings.¹⁰⁸ There is no precedent of punishment for such practices of the State.¹⁰⁹ The ICJ is a Court of Justice. However, time and again it remains a Court of law and bounds within its jurisdictional hurdle. It strictly follows its jurisdictional limits which restrict the emergence of the ICJ as a true World Court of Justice. The human suffering in this case is neglected and the court focused solely on the statist perspective of international law. However, the court ruling is on the expected line. The court should have interpreted racial discrimination includes nationality which is not listed in the prohibited grounds of racial discrimination. It caused severe discrimination and in fact capable of causing racial discrimination. The golden thread of human rights woven throughout the UN structure should be promoted by the International Court of Justice. The Court is a Principal Organ of the UN and its duty to contribute for the promotion and maintenance of international peace and security for all People.

¹⁰⁶ Also See, Declaration of Judge Crawford, 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), Provisional measures, ICJ, p. 215, para. 7 and Joint Declaration of Judges Tomka, Gaja and Gevorgian Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (II), ICJ, p. 437, para. 6.

¹⁰⁷ Iwasawa, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objection, 4 February 2021, p. 12, para. 51.

¹⁰⁸ Dissenting Opinion of Judge Ad Hoc Cot, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures (I), 23rd July 2018, p. 3, para. 9.

¹⁰⁹*Ibid.*

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