

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E.*), The ICJ Limits the Applicability of the International Convention on the Elimination of Racial Discrimination

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I. OVERVIEW

The United Arab Emirates (UAE) issued a statement on June 5, 2017, which prevented Qatari nationals from entering the UAE, and gave Qatari residents in the UAE fourteen days to leave the country.¹ The UAE reasoned that these measures were warranted because Qatar supports and funds terrorist groups, including the Islamic Brotherhood.² Moreover, the UAE alleged that Qatari authorities have meddled in the affairs of other countries by supporting terrorist groups in those nations.³ To further combat these ills, the UAE took additional measures on June 6, 2017, when the Attorney General issued a statement indicating that media organizations that expressed sympathy for Qatar would be punished by imprisonment and a fine.⁴ The UAE subsequently blocked several websites run by Qataris.⁵

Qatar instituted proceedings against the UAE with the International Court of Justice (ICJ or the Court) in June of 2018, alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁶ Qatar asserted three claims of acts or omissions by the UAE that discriminated against Qataris based on national origin.⁷

1. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. U.A.E.*), Judgment, 2021 I.C.J. Rep. 172, ¶ 26 (Feb. 4).

2. *Id.* ¶ 28.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* ¶ 1.

7. *Id.* ¶ 44.

The first claim alleged that the travel bans and expulsion orders for Qataris in the UAE were discriminatory.⁸ The second claim asserted discriminatory restrictions on Qatari media corporations, and the final claim alleged “indirect discrimination” through the above-stated actions of the UAE government, and the severing of diplomatic ties with Qatar.⁹ Qatar also requested provisional measures to protect their rights while their ICERD claim was pending on its merits.¹⁰ The Court granted provisional measures for Qatar on July 23, 2018, requiring that Qatari families separated by the UAE’s measures be reunited, Qatari students in the UAE be allowed to continue their schooling, and Qataris affected by the UAE’s measures be allowed judicial recourse.¹¹ The UAE’s request for provisional measures to “preserve [its] procedural rights” was denied by the Court on June 14, 2019.¹² The UAE also raised preliminary objections to the Court’s jurisdiction on April 30, 2019, which suspended all proceedings on the merits of the case.¹³ On February 4, 2021, the ICJ *held* that in accordance with the UAE’s first preliminary objection, Qatar’s claims did not fall within the scope of ICERD, and therefore the Court did not have the subject matter jurisdiction necessary to hear the case. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.)*, Judgment, 2021 I.C.J. Rep. 172, (Feb. 4).

II. BACKGROUND

A. Jurisdictional Requirements for ICERD Claims

The original purpose of ICERD was to pursue the elimination of racial discrimination by all appropriate means.¹⁴ ICERD was instituted when many African states that had recently emerged from decolonization pressured the United Nations to codify customary law against racial discrimination.¹⁵ In accordance with the convention, there is a Committee on the Elimination of Racial Discrimination (CERD Committee or the

8. *Id.*

9. *Id.* ¶ 47.

10. *Id.* ¶ 3.

11. *Id.* ¶ 8.

12. *Id.* ¶ 11.

13. *Id.* ¶ 14.

14. International Convention on the Elimination of All Forms of Racial Discrimination, pmbl., Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

15. *Id.*

Committee), designed to adopt measures required to enforce the convention, and report on the efficacy of those measures.¹⁶

For the ICJ to hear an ICERD claim, the petitioning party must attempt to settle the claim “by negotiation or by the procedures expressly provided for in [ICERD].”¹⁷ In *Georgia v. Russian Federation*, the ICJ held that negotiations must be distinct from mere protests and must be relevant to the dispute under ICERD.¹⁸ However, the Court held that for negotiations to meet the requirements of ICERD, an agreement did not have to be reached.¹⁹ The Court reasoned that the negotiations must still be pursued as far as possible to meet ICERD’s requirements.²⁰ The Court further investigated Article 22 of ICERD in *Ukraine v. Russian Federation*, in which the Court held that the petitioning country must have attempted reconciliation by negotiations or procedures, but both methods are not required for the Court to hear the case.²¹

The ICJ’s jurisdictional requirements for an ICERD case differ if the case is being decided on the merits, or if it is merely a question of provisional measures.²² Provisional measures are aimed at protecting the rights of both parties before a final decision on the merits can be made.²³ In *Bosnia and Herzegovina v. Serbia and Montenegro*, the Court held that when deciding whether or not to grant provisional measures, the Court is not required to reach a conclusive decision on its jurisdiction over the matter, but only that it provisionally might have jurisdiction once the full arguments are heard by the Court.²⁴

B. Analyzing a Claim Under ICERD

When analyzing a case under ICERD, the ICJ has held that customary international law requires interpreting the ICERD claim under

16. *Id.* art. 9(1)(b)(2).

17. *Id.* art. 22.

18. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed.), Judgment, 2011 I.C.J. Rep. 140, ¶ 151 (Apr. 1).

19. *Id.* ¶ 157.

20. *Id.* (citing Railway Traffic between Lith. and Pol. (Ry. Sector Landwarów-Kaisiadorys), Advisory Opinion, 1931, P.C.I.J., (ser. A/B) No. 42, at 116 (Oct. 15)).

21. 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 (Ukr. v. Russ.), Judgment, 2019 I.C.J. Rep. 166, ¶¶ 66-70 (Nov. 8).

22. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro)), Order, 1993 I.C.J. Rep. 94, ¶ 14 (Apr. 8).

23. *Id.*

24. *Id.*

Articles 31 and 32 of the Vienna Convention.²⁵ Moreover, in *Equatorial Guinea v. France*, the Court held that the treaty is first evaluated under Article 31 of the Vienna Convention, before supplementary interpretation in Article 32 is required.²⁶ Article 31 specifies that the treaty in question will be interpreted in accordance with the “ordinary meaning” of its terms, while also considering the treaty’s object and purpose.²⁷ The ICJ has frequently used the preamble of a treaty to determine the treaty’s object and purpose.²⁸

To resolve any ambiguities or avoid an unreasonable result, Article 32 of the Vienna Convention requires using supplementary materials such as preparatory works (*travaux préparatoires*), or the “circumstances of the conclusion.”²⁹ Preparatory works include the documents and declarations involved in the drafting of the convention.³⁰ In *Georgia v. Russian Federation*, the ICJ held that analysis of preparatory works was not required when the Court had already reached a decision based on the ordinary meaning of the treaty provision in question.³¹ However, since both parties had made extensive arguments relating to the preparatory materials, the Court decided to refer to these materials to confirm their conclusion.³²

The ICJ may also consider practices of the supervisory board, or the CERD Committee, when analyzing a claim under ICERD.³³ In *Republic of Guinea v. Democratic Republic of the Congo*, the ICJ held that when evaluating a case under the International Covenant on Civil and Political Rights (ICCPR), they would place great weight on the Human Rights Committee’s (HRC) interpretation of the Covenant.³⁴ However, the ICJ held that they were not obligated to follow the HRC’s interpretation.³⁵ Even so, the ICJ reasoned that their interpretation of the ICCPR was corroborated by the HRC’s comparable interpretation.³⁶

25. Ukr. v. Russ., 2019 I.C.J. ¶ 106.

26. Immunities and Criminal Procedures (Eq. Guinea v. Fr.), Judgment, 2018 I.C.J. Rep. 163, ¶ 91 (June 6).

27. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

28. Certain Iranian Assets (Iran v. U.S.), Judgment, 2019 I.C.J. Rep. 164, ¶ 57 (Feb. 13).

29. *Id.*; Eq. Guinea v. Fr., 2018 I.C.J. ¶ 91.

30. Geor. v. Russ. Fed., 2011 I.C.J. ¶ 147.

31. *Id.* ¶ 142.

32. *Id.*

33. *See generally* Ahmadou Sadio Diallo (Eq. Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 103, ¶ 66 (Nov. 30).

34. *Id.*

35. *Id.*

36. *Id.*

Cases brought to the ICJ under ICERD require an instance of “racial discrimination,” which is defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” that has the effect of limiting fundamental freedoms and has no legitimate aim.³⁷ The need for a legitimate aim for any discriminatory act exemplifies the principle of proportionality that is seen in many human rights treaties.³⁸ In the ICJ’s advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ held that the State action in question must be proportionate to legitimate aims to be valid under the ICCPR.³⁹ The same is true for discriminatory measures analyzed under ICERD.⁴⁰

The definition of what constitutes “racial discrimination” has been specified by the CERD Committee.⁴¹ In its General Recommendations on Discrimination Against Non-Citizens, the CERD Committee specified that “differential treatment based on citizenship or immigration status will constitute discrimination.”⁴² Moreover, the CERD Committee clarified that this differential treatment will only constitute discrimination if it is used to pursue something other than a proportional legitimate aim.⁴³ Finally, in its future goals, the Committee aimed to prevent certain groups from being discriminated against in relation to access to citizenship or nationality.⁴⁴

III. COURT’S DECISION

In the noted case, the ICJ relied exclusively on the ordinary meaning of the term “national origin” in Article 1, Paragraph 1 of ICERD, finding

37. ICERD, *supra* note 14, art. 1.

38. Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8(2), 15, Nov. 4, 1950, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, arts. 12, 19(3)(b), 21, 22, Oct. 5, 1977, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 8(1)(a)(c), Oct. 5, 1977, 993 U.N.T.S. 3; Organization of American States, American Convention on Human Rights, arts. 13(2)(b), 15, 16, 22, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights, arts. 11, 12(2), 29, June 26, 1981, 21 I.L.M. 58.

39. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 131, ¶ 109-112 (July 9).

40. ICERD, *supra* note 14, at pmb1.

41. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation XXX on Discrimination Against Non-Citizens, U.N. Doc. A/60/18, at 2 (2005).

42. *Id.*

43. *Id.*

44. *Id.* ¶ 13.

that the term did not encompass discrimination based on nationality.⁴⁵ The ICJ analyzed ICERD under Article 31 of the Vienna Convention on Law and Treaties, and found “national origin” not to include an individual’s “current nationality” as Qatar alleged.⁴⁶ The Court, citing *Lichtenstein v. Guatemala*, found that nationality is a legal attribute that can change, unlike a person’s national or ethnic origin at birth.⁴⁷ Moreover, the Court referenced the other characteristics of racial discrimination mentioned in ICERD (race, color, descent), all of which are also inherent at birth.⁴⁸ The Court reasoned that distinction based on citizenship is expressly excluded from ICERD in Article 1, Paragraph 2, which specifies that ICERD does not regulate instances where a State has preferences between citizens and non-citizens.⁴⁹

The Court then turned to the object and purpose of ICERD in its preamble and concluded that the purpose was to bring an end to all practices that impose a system of racial discrimination or establish a hierarchy among groups based on inherent qualities.⁵⁰ The ICJ reasoned that its reading of “national origin” was consistent with the object and purpose of ICERD, which was to prevent discrimination based on characteristics at birth.⁵¹ Finally, the Court found that differentiation based on nationality is common in the legislation of the States who are a party to CERD, and therefore cannot fall within ICERD’s scope.⁵²

The ICJ further held that the preparatory materials for ICERD, or the *travaux préparatoires*, supported its conclusion that ICERD did not protect against discrimination based on nationality.⁵³ The Court began by emphasizing that it was not required to look to supplementary materials, since it already came to a conclusion based on its analysis of the ordinary meaning of the disputed term “national origin.”⁵⁴ However, since both parties had significantly analyzed the preparatory materials, the ICJ found reason to extend its analysis.⁵⁵ The Court found that in drafting ICERD,

45. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. Rep. 172, ¶ 26 (Feb. 4).

46. *Id.*

47. *Id.* ¶ 81; see *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 18, at 20, 23 (Apr. 6).

48. *Qatar v. U.A.E.*, 2021 I.C.J. ¶ 81.

49. *Id.* ¶ 83; ICERD, *supra* note 14, art. 1.

50. *Qatar v. U.A.E.*, 2021 I.C.J. ¶ 86.

51. *Id.*

52. *Id.* ¶ 87.

53. *Id.* ¶ 89.

54. *Id.*

55. *Id.*

several delegations specified that national origin differed from current nationality.⁵⁶ The ICJ rebutted Qatar's assertion that because amendments by the United States and France that sought to exclude "national origin" from ICERD's scope were withdrawn before ICERD was finalized, the drafters wanted to include a protection against distinction based on nationality.⁵⁷ Instead, the Court held that the amendments were withdrawn to help facilitate compromise, and the U.S. and France's concerns were incorporated into Article 1, Paragraphs 2 and 3 of ICERD, declaring that ICERD would not affect a State's legislative policies on nationality.⁵⁸ Therefore, the Court held that based on the *travaux préparatoires* for ICERD, distinctions based on current nationality were not protected.⁵⁹

Next, the ICJ held that it was not bound by the CERD Committee's interpretation of ICERD.⁶⁰ The Court referenced its precedent case, *Republic of Guinea v. Democratic Republic of the Congo*, in which the ICJ held that it was not bound to interpret the ICCPR in the same way as the Human Rights Committee.⁶¹ In the noted case, the Court applied the same rationale, reasoning that it was not bound by the CERD Committee's interpretation of ICERD, and therefore it was irrelevant that the Committee read ICERD to protect against discrimination based on immigration status or citizenship.⁶² Therefore, the ICJ reasoned that its interpretation of ICERD's scope would prevail in this case, and not the Committee's.⁶³

Finally, the ICJ held that jurisprudence from regional human rights courts was not relevant for interpreting ICERD.⁶⁴ The Court reasoned that since human rights courts seek to enforce fundamental freedoms for all people, and do not distinguish between recipients, its jurisprudence vastly differed from the noted case.⁶⁵ Moreover, the ICJ reasoned that since ICERD deals with discrimination between people and not rights for all people, jurisprudence from human rights courts would not be relevant to interpreting ICERD.⁶⁶

56. *Id.* ¶ 95.

57. *Id.* ¶ 91.

58. *Id.* ¶ 96.

59. *Id.* ¶ 97.

60. *Id.* ¶ 101.

61. Ahmadou Sadio Diallo (Eq. Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 103, ¶ 66 (Nov. 30).

62. Qatar v. U.A.E., 2021 I.C.J. ¶ 100.

63. *Id.* ¶ 101.

64. *Id.* ¶ 104.

65. *Id.*

66. *Id.*

IV. ANALYSIS

In *Qatar v. United Arab Emirates*, the ICJ refused to look to guidance from regional human rights courts or from the CERD Committee in analyzing the definition of “national origin” in ICERD.⁶⁷ Instead, the ICJ relied heavily on the ordinary meaning of “national origin” in relation to the object and purpose of ICERD.⁶⁸ In the noted case, the ICERD provision in question must be analyzed under the object and purpose of the treaty.⁶⁹ The object and purpose of ICERD is the protection against all forms of racial discrimination, which cannot be furthered if the UAE is allowed to draw broad distinctions between their residents based on nationality.⁷⁰ Moreover, the majority of the Qatari nationals discriminated against by the UAE were also of Qatari heritage and descent.⁷¹ Therefore, the arbitrary line separating national origin and nationality was irrelevant in this case, because the petitioners were both of Qatari national origin and nationality.⁷²

Moreover, the Court misinterpreted its own precedent cases by concluding that the ICJ is not required to analyze ICERD in the same way as the Committee.⁷³ The Court therefore rejected the explicit goal in the CERD Committee’s General Recommendations on Discrimination Against Non-Citizens, which was to protect against discrimination based on nationality.⁷⁴ The ICJ instead relied on its holding in *Republic of Guinea v. Democratic Republic of the Congo*, in which the Court established that it was not required to model its interpretation of a treaty on that of the Committee.⁷⁵ However, in the same decision, the Court also held that great weight should be ascribed to the independent body or Committee who first interpreted the treaty.⁷⁶

The Court’s decision in this case may lead to the ICJ rejecting the CERD Committee’s analysis of ICERD claims in future cases. This problematic decision limits the sources the ICJ can look to when analyzing an ICERD claim, by eliminating perhaps the most knowledgeable

67. *See id.* ¶¶ 101, 104.

68. *Id.* ¶ 88.

69. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

70. *See generally* *Qatar v. U.A.E.*, 2021 I.C.J. ¶ 78.

71. *Id.* ¶ 30 (Bhandari, dissenting).

72. *See generally id.* (Bhandari, dissenting).

73. *See id.* ¶ 101.

74. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation XXX on Discrimination Against Non-Citizens, U.N. Doc. A/60/18, ¶ 13 (2005).

75. Ahmadou Sadio Diallo (Eq. Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 103, ¶ 66 (Nov. 30).

76. *Id.*

source.⁷⁷ Since the CERD Committee was specifically organized to pursue the elimination of racial discrimination, its knowledge of ICERD and its applications can be assumed to be expansive.⁷⁸

Further, by only relying on the ordinary meaning of “national origin,” the ICJ did not take into consideration decisions by regional human rights courts, including *Marckx v. Belgium*, in which the European Court of Human Rights held that discrimination has no reasonable justification when “it does not pursue a legitimate aim.”⁷⁹ This wider definition of discrimination was also supported by the Inter-American Court of Human Rights, which held in *Marcelino Hanríquez et al. v. Argentina* that distinction becomes discrimination when it has “no objective and reasonable justification.”⁸⁰

Here, the UAE supplied no objective or reasonable justification for its discrimination against Qataris based on nationality.⁸¹ Instead, the ICJ held that since the legal instruments in regional human rights courts have a wider scope than ICERD, its decisions have no effect on ICERD cases.⁸² Therefore, the Court ignored the principle of proportionality found in many global and regional human rights documents, which requires that the discriminatory practice in question has a legitimate aim to not violate ICERD.⁸³ In doing so, the Court also failed to follow the CERD Committee’s General Recommendations on Discrimination Against Non-Citizens, which defines discrimination as differentiation between groups with no legitimate aim.⁸⁴

Finally, the ICJ failed to appreciate the discussion surrounding the phrase “national origin” in the *travaux préparatoires*.⁸⁵ If the joint amendments by France and the United States had been accepted by the member parties, ICERD would have specifically differentiated between national origin and nationality, and would not have included protections

77. *Qatar v. U.A.E.*, 2021 I.C.J. ¶ 21 (Bhandari, dissenting).

78. *See* ICERD, *supra* note 14, arts. 9, 1(b)-2.

79. *Marckx v. Belg.*, App. No. 6833/74, 2 Eur. H.R. Rep. 330, ¶ 33 (1979).

80. *Marcelino Hanríquez et al. v. Arg.*, Case 11.784, Inter-Am. Comm’n H.R., Report No. 73/00, OEA/Ser.L/V/II.111 doc. 20, ¶ 37 (2000).

81. *See* *Qatar v. U.A.E.*, 2021 I.C.J. ¶ 67.

82. *Id.* ¶ 104.

83. *Id.* ¶ 25 (Bhandari, dissenting).

84. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation XXX on Discrimination Against Non-Citizens, U.N. Doc. A/60/18, at 2 (2005).

85. *See generally* *Qatar v. U.A.E.*, 2021 I.C.J. ¶ 96 (Bhandari, dissenting).

for discrimination based on nationality.⁸⁶ Therefore, the ICJ failed to appreciate how the withdrawal of France and the United States' joint amendments indicated that the member States specifically decided not to differentiate between national origin and nationality when drafting ICERD.⁸⁷

V. CONCLUSION

The ICJ's analysis of ICERD fails to reflect its own precedent, and that of the CERD Committee. Instead, the Court denied any jurisdiction over claims of discrimination based on nationality under ICERD and will not hear the merits of these claims.⁸⁸ Through this decision, the ICJ has moved towards a stronger reliance on analyzing only the ordinary meaning of terms in ICERD.⁸⁹ In doing so, the ICJ has neglected analysis of ICERD using the convention's preparatory works, decisions by regional human rights courts, and determinations by the CERD Committee.⁹⁰ The most surprising of these rejections is that of the CERD Committee's analysis of the issue.⁹¹ As a committee specifically designed to analyze and investigate claims under ICERD, its authority in ICERD cases has been cited by the ICJ in prior contentious cases.⁹² However, the ICJ has refused to defer to the Committee's authority in the noted case.⁹³

Through this decision, the ICJ has greatly narrowed its jurisdiction over ICERD claims. In an era where much of the world's population has been displaced and individuals are living far from their country of birth, discrimination based on nationality is likely to arise. Moreover, this discrimination is likely to also constitute discrimination based on national origin, as a person's national origin is often the same as their nationality. However, based on this case, the ICJ will not prosecute any discrimination claims based on nationality under ICERD.⁹⁴ This narrowing of the ICJ's jurisdiction may represent a reticence to become involved in the internal affairs of States. This reluctance could have significant ramifications for

86. U.N. Gen. Assembly, Twentieth Session, Rep. of the Third Comm.—Draft Int'l Convention on the Elimination of All Forms of Racial Discrimination, at 12, U.N. Doc. A/6181 (Dec. 18, 1965).

87. *See generally* Qatar v. U.A.E., 2021 I.C.J. ¶ 96.

88. *See generally id.* ¶ 88.

89. *See id.* ¶ 14 (Bhandari, dissenting).

90. *See id.* ¶¶ 17, 22-23 (Bhandari, dissenting).

91. *See id.* ¶ 22 (Bhandari, dissenting).

92. *Id.*

93. *Id.*

94. *Id.* ¶ 88.

groups being discriminated against based on national origin or nationality, who may not be able to bring their claims to the ICJ under ICERD.

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